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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1925.

No. 23, 12

DEUTSCH-AUSTRALISCHE DAMPFSCHIFFS-GESELLSCHAFT,
Appellant,

Versus

THE UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM COURT OF CLAIMS.

Compensation for Expropriated German Merchant Ships.

BRIEF FOR APPELLANT.

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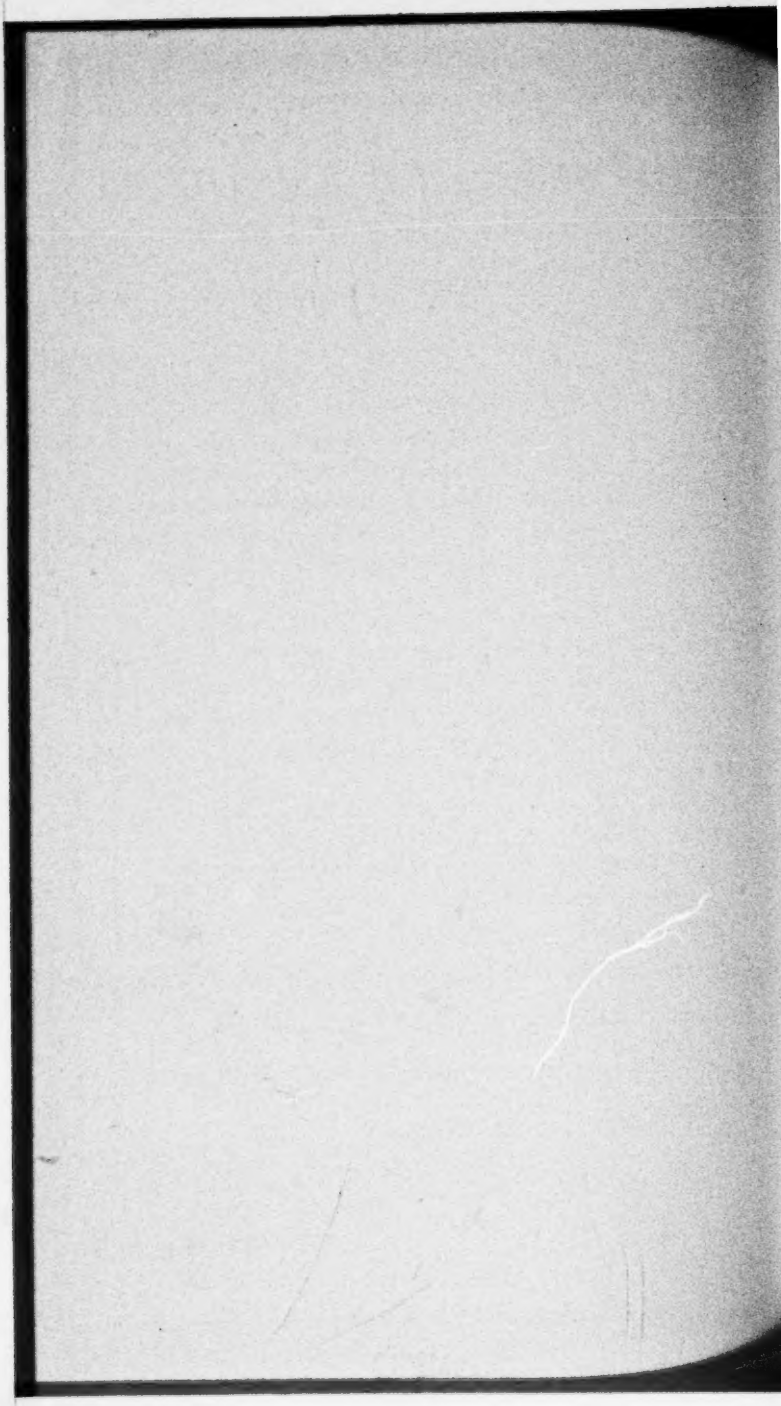

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Supreme Court of the United States

October Term, 1925.

No. 126.

DEUTSCH-AUSTRALISCHE DAMPF-SCHIFFS-GESELLSCHAFT,
Appellant,

VERSUS

THE UNITED STATES OF AMERICA,
Apellee.

BRIEF FOR APPELLANT.

Compensation for Expropriated German Merchant Ships.

The Opinion Below.

For opinion below see *Deutsch-Australische Dampfschiffs-Gesellschaft* v. *United States*, 59 Ct. Cls. 450, and transcript in this case, page 5.

Grounds on which the Jurisdiction is Invoked.

The judgment under review (sustaining defendant's demurrer) was entered in the Court of Claims March 17, 1924 (R. 5).

In that court appellant contended that the United States was obliged, by virtue of the Constitution, (Amendment VII), a Joint Resolution of Congress adopted May 12, 1917 (40 Stats. 75, this brief, page 4) and implied contract, to pay appellant the fair and reasonable value of certain merchant ships belonging to it and expropriated by the United States, (Petition R. 3).

The defendant demurred on the ground that the petition did not state a cause of action.

The Court of Claims sustained the demurrer solely on the ground that it did not have jurisdiction of the suit (R. p. 5-11).

Appeal was applied for and allowed June 16, 1924, pursuant to Sections 242 and 243 of the Judicial Code (36 Stats. 1157) as the same then stood.

The said sections 242 and 243 of the Judicial Code (36 Stats. 1157) read as follows:

> "(Jud. Code, §242.) *Appeals from Court of Claims.*
>
> An appeal to the Supreme Court shall be allowed on behalf of the United States, from all judgments of the Court of Claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court, as provided in section one hundred and seventy-two."
>
> "(Jud. Code §243) *Time and manner of appeals from the Court of Claims.*
>
> All appeals from the Court of Claims shall be taken within ninety days after the judgment is rendered, and shall be allowed under such regulations as the Supreme Court may direct."

Therefore in this case, the amount in controversy exceeding $3,000.00 (R. p. 4) this appeal from the Court of Claims is in this court as a matter of right. *U. S.* v. *Adams,* 6 Wall. 101.

The most analogous case sustaining the jurisdiction of the Court of Claims and this court, is the case of *A. W. Duckett & Co.*, v. *U. S.*, 266 U. S. 149.

Statement of Facts.

In the above entitled proceeding, typical of fifteen others, listed in Appendix A, and now pending awaiting the determination of this appeal, the claimants seek to recover from the United States Government the value of certain vessels owned by the claimants. On or before April 6, 1917, these vessels had sought asylum in various harbors of the United States or its possessions or its dependencies, or else were in the harbors of the Republic of Cuba, by which government they were delivered to the United States shortly after the outbreak of the war. With the exception of those in Cuban harbors turned over by Cuba to the United States, all these vessels were taken over by the President of the United States by executive orders under authority of a Joint Resolution of Congress of May 12, 1917 (40 Stats. at Large, 75) hereinafter set out in full.

The operative facts in the several cases are, for the purposes of this brief, identical. The claimant is a corporation of Germany, whose government accords to American citizens the right to sue it in the courts of Germany. The vessels, with the exception of those in Cuban harbors, were all in American harbors on the outbreak of the war. They were all merchant vessels and had sought asylum in our harbors under international law and American law, and were left unmolested until the United States entered the war in 1917; although in 1916, under the Ship Purchase Bill (Senate Bill 6856, Cong. Rec., 63rd Congress, 3rd Session, Vol. 52, Part I, page 321) it was proposed to have the United States Government purchase these vessels.

On April 6, 1917 the Congress adopted a Joint Resolution declaring the existence of a state of war between

the United States and the Government of Germany, and on or shortly after that date the vessels belonging to the claimants were taken under the control of agents acting under authority of the United States Government. On May 12, 1917, after lengthy debate, Congress adopted a Joint Resolution authorizing the President "to take over to the United States the immediate possession and title" of the vessels for which compensation is sought by these actions.

The Joint Resolution authorizing the President thus to take "possession and title" of these vessels reads as follows:

> "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the President be, and he is hereby authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken; or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and through the United States Shipping Board or any department or agency of the government to operate, lease, charter, and equip such vessel in any service of the United States or in any commerce, foreign or coastwise.
>
> Sec. 2. That the Secretary of the Navy be and he is hereby authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking and to make a

written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

By executive order under this Joint Resolution the President, at various dates subsequent to May 12, 1917, did actually take possession and title in the name of the United States. The principal order was dated June 30, 1917, under which the possession and title of 69 German ships therein mentioned were taken over to the United States. That order, which is typical of the other orders, reads as follows:

"Whereas the following joint resolution adopted by Congress was approved by the President May 12, 1917:

Joint Resolution Authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes.

(Resolution quoted above in full)

"And whereas the following vessels were, at the time of coming into the jurisdiction of the United States, owned in whole or in part by a corporation, citizen, or subject of the Empire of Germany, a nation with which the United States is now at war, or were flying the flag of or under the register of the Empire of Germany, or of a political subdivision or municipality thereof:

* * * *

"It is therefore ordered that through the United States Shipping Board there be taken over to the United States the possession and title of the aforementioned vessels. The United States Shipping Board is further hereby authorized to

repair, equip, and man the said vessels; to operate, lease, or charter the same in any service of the United States or in any commerce, foreign or coastwise; and to do and perform any and all things that may be necessary to accomplish the purposes of the joint resolution above set forth."

Since the date when the President thus took possession and title to these vessels, the claimants herein have been completely deprived of their vessels and of the use thereof, and have received no compensation of any kind for the property of which they have thus been deprived.

The petitions filed in these suits allege the suits to be founded upon the Constitution, the aforesaid Joint Resolution, an implied contract to pay compensation, and a claim not sounding in tort. No action on these claims has been had in Congress, and it is averred that each claimant is the owner of his or its claim, that no assignments thereof have been made, that no suits are pending in any other court based upon the facts here involved against any person who was, in respect thereto, acting in behalf of the United States, and that the suits are brought within six years after the claim first accrued.

The Government filed a general demurrer to the petition of each claimant putting in issue the question whether the petition of the claimants stated a cause of action against the United States, and a cause of action within the jurisdiction of the Court of Claims. The claimants at the trial amended the petition by dropping the claim for the use of the vessels in addition to the value at the time of taking. Compensation for use was claimed only for those vessels operated by the United States without title having been taken, the status of a few ships turned over to the United States by Cuba.

The Court of Claims sustained the demurrer of the Government and dismissed the claimant's petition in

an opinion rendered March 17, 1924 (R. 5). The Court of Claims reached its conclusion on the following reasoning:

(1) That the claim was not founded on the Constitution, a law of Congress or an implied contract to pay compensation.

(2) That the taking of "possession and title" under authority of the Joint Resolution of May 12, 1917 was "an exercise of the war power of Congress. It finds support in the constitutional provision that empowers Congress to declare war and to make rules concerning captures on land and water."

(3) That Congress had the power to confiscate all enemy property, though the Court and the Attorney General admitted that the taking of "title and possession" in these cases was not a confiscation. The Court stated: "We do not think it necessary to assert that there was a confiscation, nor to deny that Congress may have intended that the United States would at some time account for the vessels or their ascertained value."

(4) That the Joint Resolution did not specifically mention the Court of Claims as the forum for "all proceedings on any claim for compensation."

(5) That the Court of Claims had no jurisdiction, on the authority of cases arising in previous wars in which enemy property had been seized by the United States—though every one of these cited cases involved the seizure of enemy property in the course of military operations and in the area of war, not in the territory of the United States outside the area of war.

Specification of Errors.

The Court of Claims erred in denying that it had jurisdiction of the appellant's claim, for such jurisdiction is founded upon section 145 of the Judicial Code (36 Stat. 1136).

This section of the Judicial Code reads in part as follows:

"(Jud. Code, §145.) *Jurisdiction.*

The Court of Claims shall have jurisdiction to hear and determine the following matters:

(1) *Claims against the United States.*

FIRST. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable * * *"

Summary of Appellant's Argument.

The appellant argues

I. That under the very terms of the Joint Resolution, the United States did not confiscate the ships here in question, but took "possession and title" under an implied contract to pay for them. This is evidenced:

(a) by the text of the Joint Resolution;

(b) by uncontradicted statements of the members of the Committees and members of Congress which reported out and debated the Joint Resolution;

(c) by utterances of the President and executive officers of the United States in the consideration of this question;

(d) by the policy of the United States from the beginning of its history, as disclosed by its laws, the declarations of its statesmen and publicists;

(c) by the prevailing rules of international law, with which Congress indicated its intention to conform.

II. As the taking of "possession and title" were obviously not acts of confiscation, the only sustainable alternative is that it constituted an exercise of the power of eminent domain or requisition, and hence implied a promise to pay compensation.

III. Nothing in the Knox-Porter Resolution, the Treaty of Versailles or the Treaty of Berlin, bars the payment of compensation for these vessels.

IV. The Court of Claims had jurisdiction of these claims.

ARGUMENT.

I.

The United States did not confiscate the ships, but took "possession and title" under an implied contract to pay for them.

The important fact to determine in these cases is: *what did Congress actually do or purport to do* when on May 12, 1917, it authorized the President to take possession of and title to the German ships in American harbors on the outbreak of the war, the authority under which the President actually did take over to the United States the possession and title of the ships for which compensation is sought in these proceedings.

If, as can be demonstrated, Congress did not confiscate or intend to confiscate the privately owned merchant ships in question, the legal conclusion unescapably follows that American constitutional law assures to the owners compensation for their property thus taken over

to the United States, under Act of Congress, for the public use.

The Court of Claims sought to escape this conclusion by asserting that the taking was "an exercise of the war power of Congress. It finds support in the constitutional provision that empowers Congress to declare war and to make rules concerning captures on land and water." Yet the court did not assert that the "taking" was an act of confiscation, nor did they deny that "Congress may have intended that the United States would at some time account for the vessels or their ascertained value."

Before proceeding to an examination of the Joint Resolution and the facts which took place under its authority, facts which give rise to the legal consequences predicating the Government's obligation to make compensation under an implied contract, it seems desirable to point out certain errors in theory and fact which it is believed misled the Court of Claims into its erroneous conclusion that there was no implied contract to pay compensation in these cases.

(1) The taking was *not* an exercise of the power of Congress "to make rules concerning captures on land and water." The occasion of the taking was the war, the same occasion which accounted for thousands of other takings of private property *in the United States.* But though war furnished the occasion, it was still an exercise of the power of eminent domain, and was so intended by Congress. The idea that the Fifth Amendment ceases to have effect in time of war is entirely unwarranted. *Duckett* v. *United States,* (1924) 266 U. S. 149; *Campbell* v. *United States,* (1924) 266 U. S. 368. The error is involved in the failure to distinguish between the exercise of the war power (a) on its internal domestic side within the United States, and (b) on its external, foreign side in enemy territory

or in the area of military operations; that is, between (a) the taking of private property for public use *within the United States* during war time, and (b) seizures of private property *in enemy territory* or *in the course of military operations*. These classes of takings are absolutely distinct in type, in theory, in fact and in law. The first class requires compensation under the Constitution and the Tucker Act; the second does not. To cite cases of seizures *in enemy territory* or *in the course of military operations* as authority for domestic takings for the public use is to overlook elementary and vital distinctions. The importance of the distinction will again be noted later on in this brief, with a reference to the cases cited by the Court of Claims.

But that the taking of these ships *in the harbors of the United States* was not an exercise of the power "to make rules concerning captures on land and water," but merely of the customary power to take property by eminent domain for public use when public necessities require, is evidenced by the Joint Resolution itself and by what actually took place. A "capture" is a hostile seizure made with a view to confiscation or condemnation. Had there been an intention to "capture" these vessels, the Joint Resolution would not have been passed, no provision would have been made for a valuation of the vessels by a board of survey, which value was to be used as "competent evidence in all proceedings on any claim for compensation," and the vessels would have been put through a prize court and condemned, as "captured" vessels had always been from the beginning of American history and under an internationally uniform practice. It is believed that the Court of Claims was led into its error through certain decisions of the Supreme Court interpreting the Trading with the Enemy Act. *Stoehr* v. *Wallace*, 255 U. S. 239, 242; *Commercial Trust Co.* v. *Miller*, 262 U. S. 51. The word "capture" is a term of art and has

a well-defined meaning of a hostile seizure with a view to confiscation. The sequestrations under the Trading with the Enemy Act were *not* exercises of the power "to make rules concerning captures on land," as Judge John Bassett Moore, the most eminent authority on these subjects, has taken occasion in his recent book to point out. The Supreme Court should, it is most respectfully submitted, take an early opportunity to correct this misapprehension in the interpretation of the Trading with the Enemy Act, for it has been relied on by inferior courts throughout the United States and has given the Trading with the Enemy Act a construction it was not intended to have. Judge Moore, with particular reference to this misapprehension of the Supreme Court, has said of the Trading with the Enemy Act:

> "This was not, nor did it purport to be, an exercise by Congress of its constitutional power 'to make rules concerning captures on land and water.' The word 'capture' is in law a technical term, denoting the hostile seizure of places, persons or things. Men in arms are 'captured,' but a non-combatant is seized or arrested. A defended city, if taken, is said to be 'captured;' if undefended, it is 'occupied.' Property is said to be 'captured,' only when seized, in a hostile sense, under claim of forfeiture or confiscation. *These distinctions are very elementary.* The idea of provisionally holding enemy property in custody in order to prevent its use in the enemy interest is by no means new. In England, it is at least as old as Magna Carta. No one understood the act of Congress to contemplate a hostile seizure. The very terms of the act preclude such an interpretation. It merely authorized the provisional holding of the property in custody, and appropriately styled the official, who was to perform this function, the Alien Property Custodian."

(Moore, *J. B.*, International Law and Some Current Illusions, New York, 1924, p. 20).

(2) The Court of Claims states that "the action is not founded upon the Constitution or a law of Congress. The joint resolution authorized the President to take title to the vessels and he did so. It does not in terms declare a liability of the Government or of itself create a right in the plaintiff." But the "joint resolution" has the same effect as a law of Congress. When the Resolution authorized the President to take "possession and title" and "he did so," recognizing the claimant's title to these vessels, all the elements of an implied contract were present within the words of several leading decisions in this Court:

> "When the Government without instituting condemnation proceedings appropriates for a public use under legislative authority private property to which it asserts no title it impliedly promises to pay therefor."
>
> *United States* v. *North American Transportation and Trading Co.*, 253 U. S. 330, 333.
> *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645.
> *United States* v. *Lynah*, 188 U. S. 445, 462.
> *United States* v. *Cress*, 243 U. S. 316, 329.

It seems a novel interpretation of the court's jurisdiction to hold that the joint resolution must have "in terms declared a liability of the Government or of itself create a right in plaintiff." In the *Duckett* (*supra*) and *Campbell* (*supra*) and *Portsmouth* cases (260 U. S. 327, 330) the statute declared no liability and the very words "implied contract" usually preclude an express declaration of liability. The Joint Resolution of May 12, 1917, however, goes in fact almost to the point of an express declaration of lia-

bility, and is surely sufficiently clear to indicate the intent of Congress to act lawfully and to pay compensation to the owners of the property taken. The cases cited by the Court of Claims in this connection seem irrelevant. In *Ludington's* case (15 C. Cls. 453) the statute expressly denied the jurisdiction of the court. In *Hukill's* case (16 C. Cls. 562) and in *Hvoslef's* case, 237 U. S. 1, 11, the intention of Congress to permit suit was clear. So it has been in dozens of other cases. But many claims have been allowed against the United States on implied contract either where the statute was not clear or where, in fact, there was no statute at all. See the celebrated cases of *United States* v. *Lynah*, *United States* v. *Great Falls Mfg. Co.*, *supra*, and *Duckett* v. *United States*, 266 U. S. 149; *Campbell* v. *United States*, 266 U. S. 368. *Acts* determine the relations of the parties. When those acts are done under statutory authority, and take private property for public use, the law imposes liability, and the circumstances and the statute need not be so strong and positive as they are in this case in order to spell out an implied contract. If it is not an implied contract, the taking must be a tort, as the Attorney General in fact contended in the Court of Claims. It seems unnecessary to stop to refute the assumption that a taking of private property by the President under authority of Congress might have been a tort.

(3) The Court of Claims suggests that, "if the property involved in this and similar suits had not been taken, as it was, it could admittedly have been taken by the Alien Property Custodian, in which event there would have been no jurisdiction in this court." This is quite true, and strengthens the claimant's case. Had the United States not taken *possession and title* by eminent domain, the Custodian would have taken the property in custody, and title would still be in the

claimants, as in the case of all other property held by the Custodian. Had he sold the property, the proceeds would admittedly have been held for the claimants. Congress expressly declared that the rights of the *owners* would be determined by subsequent legislation, which expressly negatived any suit by those owners. As there was no taking, but only a temporary embargo, there naturally was no jurisdiction in the Court of Claims. But Congress provided in the case of these ships, not for mere sequestration by the Custodian, but for a complete taking of *title* by the United States and provided that the amount due the claimants was to be established by a board of survey which finding was to be *"competent evidence in all proceedings on any claim for compensation."* Does this language suggest "capture" or "confiscation?" Had Congress taken *title* to a German-owned factory in the United States, instead of providing for custody by the Alien Property Custodian, can it be doubted that compensation would legally have been due the owner under eminent domain? Congress provided one method for dealing with certain property—*sequestration;* they provided another method for dealing with piers, docks, ships, bunker coal, etc.—*expropriation.* They clearly avoided any inference of *confiscation,* which in fact not one person has suggested in the course of the consideration of these cases. As the proceeding was expropriation, compensation must necessarily follow, and through legal, not political channels.

(4) Enemy private property *in the United States* enjoyed the full protection of the law and the Constitution. Theoretically, by violating international law and traditional American policy, Congress might have confiscated it. They very carefully avoided any such inference. It therefore had the same legal protection as other private property. If taken for public use, compensation was necessarily due. In this respect, there is no

difference between the alien and the citizen. Even though an alien enemy owner of expropriated property might not have been able to bring his action during the war, he had six years within which to sue and the privilege of suit was unimpaired the moment the war ended. His right to compensation was not affected by his delay in bringing suit.

(5) Ships in port enjoyed the same legal protection as private property on land. This will be demonstrated in the course of the discussion below.

An examination of the historical facts in connection with the Joint Resolution of May 12, 1917, under which the United States Government has acted in the matter of the German ships, will, it is believed, establish to a demonstration that Congress did *not* undertake to seize these ships without compensation; in other words, to confiscate them. It is not denied that Congress had the power and privilege to take possession and title to the ships in American harbors, as they had such power and privilege with respect to any private property in the United States. It is, however, denied, as a matter of fact and as a matter of law, that Congress did or purported to take over these ships without placing the United States Government under a duty to make compensation. Surely, it will not be contended that the war alone changed the rights of the owners and the legal protection enjoyed by the property under American constitutional law; if the property was confiscated, that effect must be found in the terms of the Joint Resolution. Examination of the facts leads to only one conclusion, namely, that Congress intended to act lawfully and did so act, and that they intended that compensation should be paid the expropriated owners. They did everything necessary to place the United

States under a duty to pay compensation, and the Court of Claims is the appropriate forum to enforce that duty.

In order to establish the accuracy of this conclusion, it is proposed to examine:

(a) the text of the Joint Resolution,

(b) the statements of the members of the committee and members of Congress which reported out and debated the Joint Resolution,

(c) the utterances of the executive officers of the United States in the consideration of this question,

(d) the policy of the United States Government from the beginnings of its history as disclosed by its laws, the declarations of its statesmen and publicists, and

(e) the prevailing rules of international law governing this subject.

From this examination it is believed that the unescapable conclusion follows that Congress, in the Joint Resolution of May 12, 1917, contemplated the payment of compensation to the owners, that Congress purported to act in accordance with the traditions of the United States and not contrary thereto, that such was the understanding of the executive officers of the Government, and that in the consideration of the Joint Resolution Congress was well aware of the fact that American law and tradition and the rules of international law required the United States to compensate the owners of the seized ships.

(a) The Text of the Joint Resolution:

It is not denied that Congress had the legal power to undertake the act of confiscation, had they been so disposed. By so doing they would have violated every

tradition of the United States in this matter and would have stultified the national record beyond repair, but they might, so far as power is concerned, have confiscated the vessels, had they seen fit. The important and the operative fact in these cases, however, is that they did *not* confiscate or purport to confiscate the vessels to which they authorized the President to take "possession and title."

The Joint Resolution authorizes the President

> "To take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof * * * which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war."

Section 2 authorizes and directs the Secretary of the Navy to appoint a board

> "whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein at the time of its taking * * *. *These findings shall be considered as competent evidence in all proceedings on any claim for compensation.*" (Italics ours throughout this brief.)

It is apparent from the wording of the Joint Resolution that there is no word in it concerning confiscation, but that, on the contrary, it makes a direct statement that the valuations to be made by the Secretary of the Navy are to be "competent evidence in all proceedings on any claim for compensation." The express use of the words "claim for compensation," shows that Congress contemplated that claims for compensation would necessarily be brought by the owners; it is evidence of the fact that Congress realized that it would have been little short of anarchistic to simply take the vessels away from their owners without provision for compen-

sation. The reference to the "claim for compensation" negatives beyond revival, it would seem, any suggestion that the action of the Government was an act of confiscation, excluding any right to compensation.

That the claim would necessarily be instituted in the form of judicial proceedings is patent from the clause, "these findings shall be considered as *competent evidence in all proceedings* on any claim for compensation." "Proceedings" means "legal proceedings" not petitions to Congress for redress. The debates in Congress make this very clear, and they may be looked to as cumulative evidence of the facts.

It will also be observed from Section 1 of the Joint Resolution that the authority therein given to take possession and title of vessels included any vessel "which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject" of any enemy nation or "flying the flag of, or under register of any such nation," etc. It was not only ships owned by Germans which were thus authorized to be taken over, but ships in which the largest share may have been in American citizens or aliens of non-enemy nationality. The smallest German interest in any vessel, or the fact that it flew the German flag, or was under German register, regardless of the question of ultimate ownership, sufficed to make the vessel the subject of Presidential requisition. Moreover, not her present ownership or flag or register, but her ownership, flag, or register *in 1914* or at the time she entered an American harbor was the test of her subjection to expropriation or requisition. Changes in ownership, flag, or register since 1914, for the purposes of the authorization in the Joint Resolution, were not recognized.

Surely it could not be said that in the broad authorization to take over ships admittedly owned by persons other than German citizens, it was the inten-

tion of Congress to confiscate the vessels. Not only is there every presumption against such an astonishing inference, but the reference to "claims for compensation" in Section 2 of the Joint Resolution precludes the possibility thereof. It is evident that Congress realized that others than German citizens owned an interest in some of these vessels, yet it is also evident that all owners were to be treated alike. It could hardly be supposed that it was intended that all owners were thus to be despoiled and their property confiscated. The correct conclusion seems to be that all owners were thereby to be placed on a legal footing in accordance with American principles of constitutional law, and that American, like German and other owners of these vessels, would, in due time receive the compensation to which American public law entitled them.

The provision for "proceedings on any claim for compensation" applies obviously to the owners of the expropriated vessels, the valuation of which was provided for. It does not contemplate *some* owners or some persons other than owners. Any such suggestion seems specious and unwarranted.

The failure of Congress to distinguish between American and German and other foreign private owners is one of the strongest grounds to negative the belief that confiscation was contemplated.

The fact is that in the case of the Austrian steamer *Martha Washington*, title to which was taken under the Joint Resolution, the United States subsequently paid compensation for her use prior and subsequent to the taking of title. The vessel has since been returned to its owners.

By making compensation for the use of the Austrian ship *Martha Washington* from the date of the declaration of war with Austria on December 7, 1917, down to May 11, 1918, when title was taken, and thereafter, evidence is established of the fact that the Government

did *not* confiscate these ships and did not purport to do so.

The Joint Resolution of May 12, 1917, was an act to enable the United States to take the use of private property for public purposes. Section 1 of the Joint Resolution expressly authorizes the President, "through the United States Shipping Board or any department or agency of the government to operate, lease, charter, and equip such vessel *in any service of the United States* or in *any commerce, foreign or coastwise.*"

The Resolution is in the same category with other acts during the war period, such as that, for example, of August 29, 1916 (39 Stats. at Large, 645), in which the President was empowered

> "through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, * * * for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

Although this act does not even provide for a claim for compensation, it is a well known fact that millions of dollars were paid by the Government to the owners of the instruments of commerce thus taken under possession and control of the United States. *Duckett* v. *United States*, 266 U. S. 149. Surely the express mention of a "claim for compensation" in the Resolution of May 12, 1917, cannot be deemed to weaken the legal obligation under American public law to make compensation for the taking of private property for the public use.

Were further evidence necessary to demonstrate that Congress did not confiscate or purport to confiscate the ships in American harbors it would be found in the universal practice of nations, including the United States, to condemn as prize, ships it is intended

to confiscate. Had it been the intention of Congress to confiscate the ships, they would have been sent before a prize court and condemned as prize. (See A. Pearce Higgins, Enemy ships in port at the outbreak of war, British Yearbook of International Law, 1922-1923, p. 55 *et seq.*, where the practice of the various nations in the late war is outlined, and it is shown that where confiscation was undertaken, as in Portugal, the ships were condemned by a prize court).

When Congress has desired to confiscate property, as it did during the Confiscation Acts of 1861 (12 St. 319) and 1862 (12 St. 589), as a punishment for treason of those aiding the rebellion, it had no difficulty in making its meaning clear. The Act of August 6, 1861, provided that property used *in aid of the rebellion* should be the "lawful subject of a prize and capture wherever found; and it shall be *the duty* of the President of the United States to cause the same to be seized, *confiscated and condemned.*" The Act of 1862 was personal and was entitled "An Act to supress insurrection to punish treason and rebellion, *to seize and confiscate* the property of rebels, and for other purposes." Section 5 again provided that " it shall be the duty of the president" to cause the seizure of rebel's property to be thus made, and Section 7 provided that

> "to secure the condemnation and sale of any such property, after the same shall have been seized, so that it may be made available for the purpose aforesaid, proceedings *in rem* shall be instituted in the name of the United States in any district court thereof, or in any territorial court * * * within which the property above described, or any part thereof, may be found, or into which the same, if movable, may first be brought, which proceedings shall conform as nearly as may be to proceedings in admiralty or revenue cases, and * * * the same shall be condemned as enemies' property and become the property of the United States * * *"

It will be observed that in these Acts of 1861 and 1862, in which Congress purported to take the private property of "enemies" *without* compensation, three important factors are strikingly evident: (1) the word "confiscate" is expressly used; (2) the President is placed under a *duty*, not merely *empowered*, in his discretion, to seize property; and (3) judicial proceedings for condemnation of the property are provided for.

In the Joint Resolution of May 12, 1917, on the other hand, not only is the word "confiscate" or any equivalent thereof not mentioned, as it surely would have been had there been any such intention, but on the contrary, a *"claim for compensation"* is expressly contemplated;

(2) The President is not placed under *any duty;* he is merely *"authorized"* for certain public purposes, to "take over to the United States the immediate possession and title of any vessel," etc. It is a matter entirely within his discretion to determine whether the vessels are needed and whether they shall be taken over and in what service they shall be placed. There is no word or implication of command or order to the President to seize vessels, as, with respect to valuation, there is in Section 2 of the Joint Resolution, where the Secretary of the Navy is "authorized *and directed*" to appoint a board of survey to ascertain the value of the vessels, and the board's "findings shall be considered as competent evidence in all proceedings on any claim for compensation." The difference in the expression of Congressional will with respect to the President (Sec. 1) and the Secretary of the Navy (Sec. 2) is significant, and indicates that the act of the President, under authority of the Joint Resolution, was entirely discretionary and voluntary. It could not have been confiscatory, therefore, but was an act of expropriation, lawfully

undertaken for a lawful public use and purpose authorized by Congress. It inevitably therefore implies the payment of compensation.

(3) The Joint Resolution makes no provision whatever for judicial proceedings to condemn the property, which Congress would hardly have omitted, in the light of established and universal precedents, had confiscation been intended.

It is believed that this comparison between a confiscatory and a non-confiscatory Act of Congress demonstrates that the Joint Resolution of May 12, 1917, far from being an act of confiscation was in fact and in law, an act of expropriation or requisition, undertaken therefore under the power of eminent domain.

Perhaps the most convincing proof that the Attorney General, now defending these cases, did not regard the Trading with the Enemy Act or any other war Act of Congress as an act of confiscation, is to be found in the Government's Brief and Reply Brief in the case of *United States of America* v. *The Chemical Foundation*, in the Circuit Court of Appeals, 5 Fed. (2nd) 191. Presumably the same position has been taken in the Government's appeal to the Supreme Court.

At pages 188 to 210 of the brief there is an elaborate argument to prove the evident fact that Congress did not, by the Trading with the Enemy Act or any other statute undertake to confiscate private property. After citing numerous decisions of the courts of the United States to the effect that Congress did not intend to confiscate and did not confiscate enemy-owned private property the Government's brief proceeds to point out (p. 196) that: "It is to be presumed that Congress, by the amendment of March 28, did not intend to violate the 'law of nations,' by authorizing confiscation of enemy property, unless the act clearly so directs." After referring to the declaration of Chief Justice

Marshall in *Murray* v. *Schooner Charming Betsy*, 2 Cranch 64, to the effect that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains,"—an injunction most applicable to the case at bar—the Government's brief analyzes the decision of the Supreme Court in *Brown* v. *United States*, 8 Cranch, 110. In the Government's brief in the *Chemical Foundation* case, *Brown* v. *United States*, *supra*, is interpreted as follows (Government's Brief, p. 197):

> "Chief Justice Marshall bases his decision largely upon the fact that the practice of nations has been *against* the exercise of this power of confiscation and that the Constitution was adopted in the light of this practice, and the President, by the declaration of war, was impliedly authorized to take only such steps as enlightened practice of nations recognized as proper war acts."

After quoting from Chief Justice Marshall's opinion a paragraph sustaining the above conclusion, the Government's brief proceeds (p. 198)

> "That public opinion of the civilized world has been against the confiscation of private property of the enemy in time of war for at least two centuries, up to the termination of the World War, is universally recognized."

After quoting at length (p. 199) from *Ware* v. *Hylton*, 3 Dallas 199, 254, passages to the effect that the ancient practice of confiscation must be considered "as a relic of barbarism," and that it "can not continue long among commercial nations; indeed, it ought not to have existed among any nations, and perhaps, is generally exploded at the present day in Europe," that it is "at once unjust and impolitic, it destroys confidence, violates good faith, and injures the interest of

commerce," the Government's brief goes on to point out the historical development of the doctrine, as traced by Chancellor Kent in *Clarke* v. *Morey* (N. Y. 1813) 10 Johns. 69 and then quotes at length from the XVIII and XIX Camillus Letters of Alexander Hamilton, to be mentioned at length hereinafter. The Government's brief relies particularly upon that part of Hamilton's declaration of American policy, in which he says:

> "No powers of language at my command can express the abhorrence I feel at the idea of violating the property of individuals, which in an authorized intercourse, in time of peace, has been confided to the faith of our Government and laws, on account of controversies between nation and nation;"

and the further declaration of Hamilton:

> "The property of a foreigner placed in another country by permission of its laws may justly be regarded as a deposit of which the society is the trustee. How can it be reconciled with the idea of a trust to take the property from its owner, when he has personally given no cause for its deprivation"?

In explaining the Civil War Confiscation Acts, and pointing out that they were not acts authorizing the general confiscation of enemy property, the Government's brief in the *Chemical Foundation* case (p. 204) declares:

> "The Act of 1861 authorized the confiscation of all property belonging to individuals who were guilty of certain specified acts of disloyalty or of participation in the prosecution of the war by the Confederate States. The Act of 1862 authorized the confiscation only of property which was being used in support of the rebellion; and the Act of 1863 authorized the seizure only of property which had been abandoned by the own-

> ers. The purpose of all these acts *was to punish American citizens for acts of disloyalty*, and although they were later sustained on the doctrine of seizure of enemy property, *the legislation cannot be cited as a precedent for confiscation of enemy property during the war just ended.*"

The case of *Miller* v. *United States*, 11 Wall. 268 contains much *dictum* which is bad law. Without sufficient analysis it has been used by courts during the late war to sustain the power of confiscation. It was improperly invoked by the Court of Claims in this case, not only because it does *not* sustain the general power of confiscation—the case involved the Acts of 1861—but because the court expressly refrains from suggesting that the ships were confiscated. No one could seriously contend that they were. The Government's own contention that the Acts of 1861 and 1862 constitute no authority for the confiscation of enemy private property in a foreign war is confirmed by the statement of Mr. Hyde, until recently Solicitor for the Department of State (International Law, v. II, p. 238):

> "It is not believed that [the Acts of 1861 and 1862] in view of the nature of the conflict then existing, indicates legislative approval of the confiscation in a foreign war of the property of alien enemies within the national domain."

After quoting from several Supreme Court decisions deprecating and denying the legitimacy of confiscation, the Government's brief in the *Chemical Foundation* case proceeds (p. 206):

> "We have already shown that this doctrine (the immunity of private property from confiscation) was recognized by Congress at the time the Trading with the Enemy Act was adopted and that the Act was drafted and enacted for the purpose of carrying out this enlightened modern

> public policy, which may take over the custody and control of the property of the enemy during war *but does not confiscate it.*"

The Government's brief (pp. 206-208) then quotes from the addresses of President Wilson to prove that any thought of confiscation of private property was to him abhorrent.

At p. 574 of the Government's brief the thought is again expressed that "the policy of the United States and the modern policy of all civilized nations has forbidden the exercise of the power, which is admitted to exist in Congress, to confiscate alien property seized on land outside of the military zone of war," and the Government then affirms that Congress did not and did not purport to violate this policy in the late war. It is not to be doubted, after the examination of American policy and practice, hereinafter to be reviewed, that an identical immunity extends to private enemy merchant vessels found in port on the outbreak of war.

Had Congress not contemplated the normal procedure for compensating the owners of the seized ships, they could and would have incorporated a provision to that effect in the Joint Resolution. When Congress did not wish to commit itself to compensation, it had no difficulty in so expressing itself in other legislation of the war period. For example, Section 12 of the Trading with the Enemy Act of October 6, 1917 (40 Stats. at Large, 423) provides that

> "after the end of the war any claim of an enemy or of an ally of an enemy to any money or other property received and held by the Alien Property Custodian or deposited in the United States Treasury shall be settled as Congress shall direct."

The difference between this language and the language of the Joint Resolution under discussion inevitably raises the inference that in the one case it is intended

to postpone the question of restoration of the property or compensation for it until "after the end of the war" when the claims were to be settled "as Congress shall direct," whereas in the Joint Resolution there was no such contingency or eventuality provided for. In one case there was merely sequestration, in the other, expropriation. In the Joint Resolution payment was contemplated as a matter of law, and, as will be demonstrated hereinafter by an examination of the debates, the only serious doubt seems to have been whether the compensation should be immediate or whether the parties should be left to their subsequent remedies in the courts.

That Congress was well aware of what it was doing and that it intentionally avoided any inference of confiscation, is evident from the discussion, by the Committee, of the early case of *Brown* v. *United States*, 8 Cranch, 110. In that case, it will be recalled, Chief Justice Marshall stated that while there was a right (power) to confiscate enemy property found in port on the outbreak of war—which Congress had not exercised—nevertheless, he and a majority of the court deprecated the practice and held that in the United States such property could not be confiscated without special legislative enactment *ad hoc*, for by the Constitution the power to "make rules concerning captures on land and water" vests in Congress.

Although since 1854 the law has been practically uniform throughout the world, a practice to which the United States has firmly adhered, that ships in port on the outbreak of war have an immunity from confiscation, Congress in 1917 had before it and under consideration the case of *Brown* v. *United States*, and in full contemplation thereof expressly avoided any inference that their action was confiscatory, or that they were making a "capture" on land or water. On the contrary, they made it clear that they were merely

authorizing the legal expropriation or requisition of privately owned merchant ships and contemplated that a claim would be brought for compensation in judicial "proceedings," and undertook to aid those proceedings by providing for a valuation commission and board of survey whose findings were to be considered "as competent evidence in all proceedings on any claim for compensation." It would seem difficult more firmly and completely to negative the inference that confiscation was in the mind of Congress, or was exercised, but, on the contrary, it seems clear that the very opposite of confiscation, namely, compensation, was contemplated and anticipated by Congress.

(b) The statements of the members of the committee and members of Congress which reported out and debated the Joint Resolution:*

But if there were any doubt, after the reading of the Joint Resolution, as to what Congress actually intended, that doubt, it is believed, would be permanently removed by an examination of the debates in Congress, and particularly the declarations made by the Chairman of the committee which reported out the Joint Resolution now under discussion.

Mr. Alexander, the Chairman of the House Merchant Marine Committee which had this bill in charge, said in the House on May 7, 1917 in introducing the bill already passed by the Senate, that there was no doubt that compensation was due, but that it ought not to be paid to the German owners in 1917 while the war was still on. There seems to have been no doubt in the minds of the members of Congress that compensation

*There seem to be two editions of the Congressional Record of May 7, 1917; one edition carries the debates from page 1900 to 1983; the other begins at about page 1960 *et seq.*

was due, and they so construed section 2 of the Joint Resolution. There was a difference of opinion as to *when it was due;* immediately, as several members contended, or at the end of the war by proceedings in the Court of Claims, or by adjustments made between the two governments. It was never, however, contended by anyone, so far as can be found, that the Joint Resolution constituted a confiscation of the property to the United States, thus leaving out of account the private property interest involved in the taking. Here it may be said that the matter of the expropriated ships was not adjusted by the two Governments nor were any arrangements made with respect thereto. The municipal law of the United States must therefore take its course.

Mr. Alexander, Chairman of the House Merchant Marine Committee, said (*Cong. Rec.*, May 7, 1917, page 1903):

> "We could compensate the Hamburg-American and the North German Lloyd Steamship Companies for these ships; *if we pursue our policy in the future as in the past we will compensate these owners for these vessels,* but at this time, early in the war, and with conditions changing from day to day, the equities shifting, it will be time enough, in the view of the Senate and in the view of the administration and in the view of the Committee on the Merchant Marine and Fisheries, to adjust these equities after peace has been declared. * * * "

Mr. Alexander ended his remarks after submitting numerous authorities on the American policy and on international law with respect to the status of ships in port on the outbreak of war, by the statement (*Cong. Rec., Ibid.*, page 1909):

> "It should be evident to all mankind that our Government, in the conduct of the present war,

will be governed by those broad principles of humanity and justice that have given lustre to our flag."

Mr. Rowe, Congressman from New York, in the debate on House Joint Resolution 62 (*Cong. Rec., Ibid.*, page 1919) said:

> "Such seizures are made in most of the States of the Union, and afterwards they settle the bill. We even take the real estate in my State and afterwards condemn the property and find the value. It is done when the real estate is wanted and wanted immediately. Here is something that we want. We must have ships that can carry freight and soldiers from this country and Canada to Europe.
>
> "*There is no man in this House to-day that wants us to take advantage of the private citizens of the United States or the private citizens even of Germany. They must and will be paid.* We do hold, however, that no money that is paid for these vessels should be transferred to any German citizen or to the German Government *before this war is closed.*"

Mr. Stafford of Wisconsin made several statements of law and policy which represented the considered views of a good many of his associates, and which constitute sound law at all times. Among other remarks, he said the following (*Cong. Rec., Ibid.*, page 1919):

> "I fully approve of the policy that is provided for in this bill for the Government to appropriate these foreign interned ships, but I also wish to advocate the duty of the Government to pay those rightful owners, whoever they may be, for the use of those ships. * * *
>
> "And I make this claim, that if Germany accords to our citizens in their courts the same right to sue the Government as is accorded aliens in the Court of Claims, if she accord them reciprocal rights, then these foreign subjects, upon the

seizure of their property, have the right to go into the Court of Claims and prosecute their claim for indemnity or for the return of the property. I shall not take up the time to call the attention of the committee to the clauses under the judicial code that authorize such procedure. In another body when this resolution was suddenly presented for consideration reference was made to the case of *United States against Russell*, Thirteenth Wallace, page 623, as justifying our action in appropriating these private vessels. I wish to read from that decision, which has been many times referred to approvingly in subsequent decisions of the Supreme Court, and to call attention to the principle which I am enunciating here, that if we confiscate this property for war's ends—and I claim that is the only justification, because of the need at the present time to assist our Government in this war in the transportation of munitions and troops—then we must recognize the rights of property, and the owners are entitled to be reimbursed by our Government.

* * *

"Undoubtedly we would have a right to confiscate them if they were public vessels of the enemy, but as these vessels are the private property of subjects of the alien country, we should in conscience reimburse them, just as under international law we are bounden to reimburse Germans or Austrians in this country in case the Government should have need to take for war purposes any of their private property. Why, no one claims that bonds, money, or any other property of foreigners domiciled in this country can be taken by the Government without the owners being compensated.

* * * * *

"So with these private vessels, though they are movable, nevertheless they are private personal property. They are the private property of these stockholders just as bonds owned by enemy aliens in this country are their private property; and if perchance they are destroyed by a submarine

attack of the enemy that does not destroy the rights of these alien owners to their rights of property, which are recognized in international law" (pp. 1919-1920).

After hearing Mr. Stafford, who contended that the ships could not be taken without payment of compensation, Mr. Bankhead interrupted to ask (*Cong. Rec., Ibid.*, page 1920):

> "I will ask the gentleman from Wisconsin if he can find in either one of the sections of the joint resolution as reported to the House a denial of the principle he is arguing for?"

Mr. Stafford then added (page 1920):

> "The bill provides, in section 2, for the means whereby the Secretary of the Navy may appraise the property that is taken over and says that that appraisal shall be considered as competent evidence in all proceedings hereafter authorized in any claim for compensation. That rather presupposes that some person somewhere will make a claim for damages."

Mr. Hardy of Texas, another member of the Committee, distinctly affirmed that the power then exercised was the power of eminent domain. He said among other things (*Cong. Rec., Ibid.*, page 1921):

> "*This bill simply sets in motion the power of eminent domain of the Government to take the property of an alien or of a citizen,* and the Government has the right in a case of public necessity arising from war to take over the property of its own citizens, and certainly no less the property of any other resident human being within its borders."

He added (page 1921):

> "Section 2 provides for a survey and estimate of the value of the ships taken over. It

does it in order that that survey might be held as *prima facie* evidence of the facts; that is, of the value of the ships when taken over. It does not undertake to decide the matter or manner of compensation now * * *.

"I want to say that, so far as our policy as a nation is concerned, from its foundation it has never been a policy of ruthless power. We have never intended, never desired, and never will desire to wrongfully take the property of citizens of any nation, even though we are at war with that nation. *It has been our policy that any property which comes rightfully within our jurisdiction will have all of the rights of its owner preserved,* and when this war is ended there will not be a German right which will be violated by the American people, and I believe I know this Congress well enough to know that it will never use its power to take from any man, German, Austrian, Englishman, Frenchman, or American, any right that justly belongs to him. * * *"

"It is a well-recognized fact that under the right of eminent domain the Government takes the things necessary for its defense" (p. 1922).

Mr. Small of North Carolina, in asserting the necessity of compensation, said (*Cong. Rec., Ibid.*, page 1922):

"I am in favor of this bill which appropriates the interned ships of Germany, with which we are at war. I think it can be justified upon the ground of emergency and necessity, but *at the same time I do not believe there should remain the slightest question that there should be compensation to the owners of these ships to the extent of their value as of the present time.* * * *

"Mr. Chairman, the President has said, and I take it it is the sentiment of every intelligent and just-minded citizen in our country, that *the private property of alien enemies within the United States shall be scrupulously respected and preserved.* These ships in large degree, if not altogether, are the property of residents or citizens of the Imperial German Government. Sim-

ply because this property consists of ships instead of money in bank or real estate located here, or buildings, or movable personal property, does not in my mind differentiate them so as to apply a rule of right to one and not to the other."

Mr. Edmunds, a leading member of the House from Pennsylvania, in pointing out that there was no intention to confiscate the property, but an intention to requisition it, leaving the payment of compensation open to the future, said (*Cong. Rec., Ibid.*, page 1923):

> "*I am sure there was no intention to confiscate this property.* It was simply left open for adjudication at an early date.
>
> • • • • •
>
> "We take the ships. We have arranged to leave the question of compensation open. The treaty is here. *Undoubtedly all those questions will be brought up when this case will be adjudicated in the Court of Claims, where they have a right to take it.*
>
> "In the case of *Wagner* v. *The Juanita*, Twenty-eighth Federal cases, page 382[illegible], the court reaffirming the principle stated by Chief Justice Marshall, said:
>
> > 'In respect to the vessel herself, now in the port of New Orleans, I consider the reasoning of the court equally strong against the claim of the libellant; she is to all intents and purposes property as much *infra*-territorial, within the limits of the United States, as the cargo placed in store a few hundred yards from the shore where she is moored; and she can with no more reason be said to be beyond the territorial limits of the United States than the river upon whose waters she is now floating.'
>
> "Now, gentlemen, undoubtedly the committee, realizing that the Government needed these ships, has taken the best course that it is possible to devise to take possession of them at this time, and has left the question entirely as to how they were to be settled for open for the future."

Thus it was Mr. Edmunds' view, and, it appears, that of the House generally, that the ships were being taken over under a theory of requisition, and the question was not as to *whether* they would be paid for, but as to *when* and *how*. The private title was always recognized, and there was no thought of confiscation.

After citing the resolution of Congress on April 28, 1904 (*infra*), which proclaimed the time-honored American policy (going much further even than the established policy of exempting from seizure and condemnation ships in port), of exempting from capture *at sea* all private ships and other property not contraband, Mr. Edmunds said (*Cong. Rec., Ibid.*, page 1923):

> "Now, gentlemen, you will see that the House and the Congress has at all times stood *for fair compensation for anything it has taken belonging to anybody else, whether belonging to our own citizens or to foreign citizens.* I think we can afford to pass this resolution and *leave it to the court to pass upon in due time what we are to pay for these ships.*"

Mr. Slayden of Texas, one of the wisest members of the House, a man of sound judgment and integrity, and long a member of the House Committee on Foreign Affairs, in stating the purpose of the Treaty with Germany, which he feared the House might violate by not providing for immediate compensation, said among other things (*Cong. Rec., Ibid.*, pages 1923-1924):

> "The purpose of Article XXIII was to mitigate the horrors of war and to compel respect for the rights of property of private citizens and to secure decent treatment for individuals forced to reside in an enemy country.
>
> "I am convinced that section 2 of this resolution designedly recognizes that obligation in the words that permit a board of survey to be appointed to value this property that we are about to appropriate to our military use.

"It is a recognition of the fact that the obligations of the three treaties to which I have referred—of 1785, 1799, and 1828—still bear on us, are still to be respected in principle; and I am delighted to know that the chairman of the committee (Mr. Alexander) was wise enough *to have those obligations recognized in the way he did, and incorporated in the resolution itself.*"

Mr. Slayden added a statement which will always be deemed to reflect credit upon the man who uttered it, because it conserves the traditions of this country, traditions which no court can disregard without impairing the integrity of the United States. He said in concluding his address (page 1924):

"We can not build up civilization, we can not provide anything like a reasonable scheme for the maintenance of peace between the governments of the world unless we do respect that principle; and I would like to have it known to the whole world that it is the opinion of the American Congress, without additional legislation being necessary, that private property rights that were undertaken to be cared for in the three treaties I have mentioned are to be respected, and that the United States, at least, is going to conduct its war upon the basis of justice to private citizens; and that after the war is over we stand willing actually, in spirit and in fact, to help the world reestablish itself on a basis of sanity, and meantime we are going to keep the faith to which we are plighted.

"Mr. Chairman, the fact that treaties have been broken and that people who were our friends have now for the time being become our enemies, ought not to cause us to set aside all the decent and well-conceived laws of the past for the recognition of their rights and the governing and protection of personally innocent and unoffending individuals. The most distressing feature of the situation in this country is the intolerant spirit shown by some of our people. Regardless of

treaties I have heard a demand that we should take the property of Germans in the United States. Because a man has the temerity to stand up and plead for justice to citizens of an enemy country, who unfortunately happen to be here, he is frequently denounced as pro-German; because he merely stands for reason, for common sense, and for recognition of the principles that this Government has stood for from the beginning, and which I am proud to say I believe it will stand for until the end. These intolerant people, these people who believe it to be the duty of every citizen to hate the individuals of another country with which his is engaged in war, have been manifesting a hostility that is not creditable to them as men, and certainly if shared in by this Government as a political entity will reflect no credit upon it."

Mr. Hadley of Washington, in speaking of section 2 of the Joint Resolution, states the purposes of the survey and of the evidence that it was to collect. He says (*Cong. Rec., Ibid.*, page 1924):

> "It is to be preserved, and *to be submitted in any court of competent jurisdiction that may deal with that subject.* That is expressly provided by the resolution."

Mr. Hadley added (page 1924):

> "* * * it * * * will show the resolution and *purpose on the part of the Government to recognize the claim for damages* in case the party has a right to it. * * *
>
> "I hope gentlemen considering the resolution will not lose sight of the fact that, while the committee did not attempt to provide the machinery for the final solution and determination of the matter, *it did not ignore the fact that compensation might be had*" (p. 1925).

Mr. Campbell of Kansas, a veteran member of the House, in insisting that compensation ought to be paid

for the ships seized, and insisting that such compensation would be given—though at the end of the war—said (*Cong. Rec., Ibid.*, page 1925):

> "I do not agree that any settlement should be made at this time with the owners of these ships *but the owners of these ships need have no fear; they need not look forward to a time when the war shall have been ended to any difficulty they will have in getting justice from the United States.* As to whether or not these ships shall become the victims of submarines at the hands of the German Government raises a question that will no doubt enter into the settlement of the matter of the payment for these ships; but the Government of the United States has always maintained its position of adhering with the strictest account to every treaty that it has entered into and to every obligation that it has assumed or that is thrust upon it, and that will be true with respect to these ships and to every incident growing out of this war as it has with respect to every other. The owners of the ships and the German Government may well look back to the action of the United States at the termination of the Spanish-American War, when this Government did more than was really expected of it by the vanquished.
>
> * * * * *
>
> "That is all I had in mind to say, and I would not have stated it if it had not been that it has seemed to me there has been some anxiety here for fear that the Government of the United States would take advantage of its power in the premises and in the final conclusion not do justice by the owners of any property it may seize for war purposes."

Mr. Lenroot, in rejecting an inference from his speech that possibly compensation might not have to be paid, says (*Cong. Rec., Ibid.*, page 1929):

> "I do not say for a moment that we ought not to compensate the owners of these ships."

Mr. Fess of Ohio, in pointing out that the second section of the act definitely suggests that the theory of the seizure is one of requisition and not confiscation, says (*Cong. Rec., Ibid.*, page 1930):

> "*But the second section suggests that it is to be requisitioned,* or at least it lays the grounds for it, since it there provides for a board of survey to ascertain the values of these vessels. It does not specify just why that is done, but all of us understand that in case it is to be adjudicated on the question of value, *this Government by this provision shows clearly its intention not to take any advantage of the owners of these vessels.*"

Mr. McFadden, in pointing out that the ships were private ships and that the United States could not do otherwise than pay for them, says (*Cong. Rec., Ibid.*, page 1932):

> "If, on the other hand, the real ownership of these boats is not vested in the German Government, I am interested just to the extent to see that confiscation of private property is not had by this Government without some basis of settlement being provided for eventually. I do not say at this time, but eventually, but believe the law should be made very specific now; and in that connection I want to quote a statement which was made by the State Department, with the authority of the President, on February 8, 1917, in which it stated:
>
> > 'The Government of the United States will in no circumstances take advantage of a state of war to take possession of property to which international understandings and the recognized law of the land give it no just claim or title. *It will scrupulously respect all private rights of its own citizens and the subjects of foreign States.*'

"Then I also want to quote from the President's message to this Congress on April 2, in which he said this:

> 'Just because we fight without rancor and without selfish object, seeking nothing for ourselves but what we wish to share with all free peoples, we shall, I feel confident, conduct our operations as belligerents without passion and ourselves observe with proud punctilio the principles of right and of fair play we profess to be fighting for.
>
> 'It will be all the easier for us to conduct ourselves as belligerents in the high spirit of right and fairness because we act without animus.' "

Mr. McFadden added:

* * * * *

"* * * but, however grave the situation, shipping that came to our ports in the legitimate prosecution of ocean traffic, the property of individuals and companies, should not be seized *without rendering at the proper time just compensation therefor.*

* * * * *

"* * * but, on the other hand, if it is finally determined that these boats are the property of individual citizens of Germany, after the war is over that prompt and full settlement will be provided for to the individual citizen."

On April 30, 1917, while the Joint Resolution of May 12, 1917, was pending, and because of his impatience at the failure to report it out more quickly, Senator Knox (*Cong. Rec., Ibid.*, page 1570—other edition page 1510) presented a resolution reading:

> "*Resolved*, That the President of the United States be, and he is hereby, requested to at once requisition all vessels of alien enemies of the United States in the ports and waters of the

> United States or elsewhere found, and to use the same in the prosecution of the war * * * in such trade or manner as will, in his judgment, best subserve the interest of the United States."

Mr. Knox was informed by Mr. Overman, a member of the Judiciary Committee, that the bill then about to be reported out was a bill to the same effect, and Mr. Knox stated that he introduced his bill in order to bring about speed.

The Court of Claims in its opinion (R. 11), utterly misconceives the purpose of Senator Knox's bill. There is not the slightest inference that Congress did not intend to authorize suits in the Court of Claims. On the contrary, there is overwhelming evidence that they did. But the acts they authorized, and the action taken thereunder, created those legal relations which gave the Court of Claims jurisdiction under the Tucker Act.

Senator Knox, ex-Secretary of State, in showing that the ships were not being confiscated, which, in his judgment, would require a prize court, stated (*Cong. Rec., Ibid.*, page 1571):

> "Prize courts are created not to adjudicate upon vessels that have been seized *by requisition or other process, but are created for the purpose of passing upon captured vessels;* and in the event of a seizure by such a method as proposed by this resolution, just as the Senator from Massachusetts suggested a moment ago, compensation awaits the event of the war and is determined by the treaty of peace."

It will be shown hereafter that the Treaty of Berlin, which constitutes the treaty of peace between the United States and Germany, contains no denial of the principle of American public law that the private ships taken for the public use under the Joint Resolution of May 12, 1917, shall be compensated for. The Treaty of Versailles, to which the United States is not a party, did

make provision for the German private ships taken over by Great Britain and other Allied governments, but from these provisions the United States has expressly excluded itself.

The intent of the House and the Senate to observe the rules of international law in the appropriation of the German ships is clear throughout the entire debate. Mr. Knox (page 1573), after pointing out that the sixth Hague convention enabled the belligerents to detain an enemy merchant ship and restore it at the end of the war or requisition it and pay for it, indicated that it was the latter of these alternatives that we were acting upon, and he seeks to justify it by showing that this was exactly what the British purported to be doing. He says (page 1573):

> "In this connection I want to call your attention to what Great Britain has done in this situation, finding, as we found, a large number of German merchant vessels in her ports. In this connection it is to be noted that on the 10th of February, 1915, the British secretary of state for foreign affairs adddressed the American ambassador, and after referring to the act of the German Government in destroying British shipping and the consequent need for vessels stated what I now read from the British Secretary's language:
>
> > 'To ease the situation His Majesty's Government are resorting to the power of requisitioning which is given by the convention (Hague Convention, No. VI), so that these ships may again be placed in active service.'
>
> "So our great maritime ally, Great Britain, rather than take over the title to these vessels subject to paying compensation after the war, requisitioned the vessels, which leaves Great Britain and would leave us in this position, that at the conclusion of the war we would have the option to say we have taken the use of your

vessels during the war, and all we are responsible for is the value of that use, less the wear and tear, depreciation, and damage that they have sustained. Necessarily, if the Senate should adopt this theory of acquiring the use of these vessels, it would not be necessary to make all these provisions about the ascertainment of liens, the ascertainment of the division of the title, or anything else, because, they being taken as the vessels of an alien enemy, there would be no method of charging, no machinery which was created, and no possible way of adjustment until the conclusion of the war."

By taking *the title* of the ships and ascertaining their value at the time of acquisition of title, Senator Knox thus conceived that we were avoiding the questions which would have arisen had we only taken *the use* of the ships.

Senator Lewis of Illinois, in calling attention to the Treaty with Germany which maintained the sanctity of private property, insisted that the resolution should accord with this time-honored tradition of the United States and with the provision of the Treaty, and called attention to the fact that the Joint Resolution provided merely a different method of compensation from that of immediate payment; but that compensation was intended and contemplated at a future time is hardly to be doubted from a reading of the debates and speeches made by the members of the committee that reported the bill to the floor of the House and the Senate.

The Joint Resolution itself, of course, as already observed, in providing that a board of survey should estimate the value of the ships, and that "these findings shall be considered as competent evidence in all proceedings on any claim for compensation," definitely implies that the ships were not taken on any theory of confiscation, but that future compensation was contemplated. While it does not provide the method of compensation, it leaves this to be applied according to the general principles of American constitutional law.

(c) The utterances of the executive officers of the United States in the consideration of this question.

Were further evidence required that the United States, in taking possession and title of the German ships in our harbors on the outbreak of the war, was exercising its power of requisitioning private property for the public use under eminent domain and not exercising the alleged power of confiscation, it would be found, it is believed, in the statements of executive officers of the United States, both contemporaneous and subsequently in office.

That it was an established principle of American policy not to confiscate private enemy ships in our ports on the outbreak of war, and that we had been the foremost nation in the world to advocate the general adoption of the even more far-reaching practice of giving immunity to private property at sea generally, is a well known fact. The history of the American policy will be outlined hereafter.

That it was the intention of the United States not to reverse its enlightened past by reverting to barbaric practices of the Middle Ages, never adopted or espoused by the United States, seems also evident. That, on the contrary, it was the intention of the United States to adhere to its traditional enlightened policy in dealing with private property, including ships, may be deduced from the statements of President Wilson on several occasions. In the present connection it may not be improper to quote from the public announcement of the State Department, issued with the authority of the President on February 8, 1917, in which it is declared:

> "The Government of the United States will in no circumstances take advantage of a state of war to take possession of property to which international understandings and the recognized law

of the land give it no just claim or title. It will scrupulously respect all private rights alike of its own citizens and the subjects of foreign States."

In his message to Congress of April 2, 1917, the President made an express declaration that we would adhere to the high standards of public morality and fair dealing which had marked our operations as belligerents in the past. It must surely be assumed that he did not contemplate that we would at one stroke overturn the time-honored traditions of the Nation. In that address he stated:

> "We have no selfish ends to serve * * *. The Government of the United States will in no circumstances take advantage of a state of war to take possession of property to which international understandings and the recognized law of the land give it no just claim or title. * * *
>
> "Just because we fight without rancor and without selfish object, seeking nothing for ourselves but what we wish to share with all free peoples, we shall, I feel confident, conduct our operations as belligerents, without passion and ourselves observe with proud punctilio the principles of right and of fair play we profess to be fighting for.
>
> "It will be all the easier for us to conduct ourselves as belligerents in the high spirit of right and fairness because we act without animus."

Franklin K. Lane, Secretary of the Interior in the administration of President Wilson, and one of his most trusted advisors, in writing to the late Frank I. Cobb, editor of the New York *World*, on April 12, 1917, when the policy of the Joint Resolution of May 12, 1917 was under discussion in the Cabinet, said:

> "I am in favor of taking all the German ships under requisition, paying for their use eventually, but this is a matter of months." (Letters of Franklin K. Lane, 1922, page 245.)

On April 15, 1917, Secretary Lane wrote to his brother George W. Lane, as follows:

> "We, of course, are going to press into service at once the German and Austrian ships, such of them as can be repaired and will be of use in the freight business, but *we will not confiscate* them; we will deal with them exactly as we deal with American ships, *paying at the end of the war whatever their services were worth.* This spirit of fairness is to animate us throughout the war." (*Ibid.*, page 246.)

That this proposal of Secretary Lane reflects the traditional policy of the United States and was incorporated in the Joint Resolution of May 12, 1917, seems evident. It was framed with full knowledge of the policy of the United States with respect to the subject of enemy private ships in port on the outbreak of war, a subject to which an entire Hague convention had been devoted in 1907, and on which the United States had taken a very definite and enlightened position, to be referred to presently.

There is not a shred of evidence, it is believed, to contradict the conclusion that Congress, in passing the Joint Resolution, acted upon the premises laid down by Secretary Lane, and believed itself to be following out and acting in conformity with the traditional policy of the United States.

It is interesting to observe that the view that the resolution of May 12, 1917 contemplates the payment of compensation is entertained by the Department of State. The Department, in a letter written to Senator Lodge under date of December 8, 1920, over the signature of Assistant Secretary Van S. Merle-Smith (printed on page 4 of the hearing before the Committee on Foreign Relations of the United States Senate, 66th Congress, 3rd Session, on Senate Bill 4445 to provide for the return of the steamship *Martha Washington* and pay compensation for her use), expressly stated:

> "The Joint Resolution of May 12, 1917, which authorized the seizure of the vessel, contemplates the payment of compensation."

This letter, with the important statement just mentioned, was used by the Honorable Charles E. Hughes, late Secretary of State, in his argument before the House Committee on Merchant Marine and Fisheries (66th Congress, 3rd Session) under date of December 15, 1920, concerning the return of the steamship *Martha Washington* to its owners, and compensation for its use. On page 17 of the hearings, in a colloquy between Mr. Hardy of Texas, a member of the Committee, and Mr. Hughes, the following observations may be noted:

> "Mr. Hardy: As I understand it, under international law the private property, and justly so of a private citizen of a country which may get into war with us, is really sacred?
> "Mr. Hughes: And ought to be."

It would seem from these statements made by high government officials, that they well understood that the act of taking possession and title to the private merchant ships here in question was an act of requisition in accordance with American policy and tradition and international law, and was, therefore, the very opposite of an act of confiscation.

(d) The policy of the United States Government from the beginnings of its history as disclosed by its laws, the declarations of its statesmen and publicists:

From the beginning of the history of the United States we have adopted the policy not only of giving the most liberal treatment to merchant ships found in our ports on the outbreak of the war, but we have been the leading nation to assert the wider doctrine that private property at sea shall be exempt from capture.

In 1798, relations with the French Republic became so strained that war seemed unavoidable and imminent. The legislation usual to such a condition of affairs was passed, although, as a matter of fact, no hostilities ensued. On July 6th of that year, "An Act respecting Alien Enemies" (1 Stat. at Large 577) was passed by Congress, Section 1 of which reads in part:

> "Provided that aliens resident within the United States who shall become liable as enemies in the manner aforesaid, and who shall not be chargeable with actual hostility, or other crime against the public safety, shall be allowed, for the recovery, disposal and removal, of their goods and effects, and for their departure the full time which is, or shall be stipulated by any treaty, where any shall have been in existence between the United States and the hostile nation or government, of which they shall be natives, citizens, denizens or subjects; and where no such treaty shall have existed, the President of the United States may ascertain and declare such reasonable time as may be consistent with the public safety, and according to the dictates of humanity and national hospitality."

Again in 1812, in the famous case of *Brown* v. *U. S.*, 8 Cranch. 110, despite the opinion of the court that from the point of view of international law the power existed to confiscate enemy property found in one's ports at the outbreak of war—a rule which since 1854 has become obsolete—and despite the fact that our enemies were exercising this power to condemn our property, nevertheless, Chief Justice Marshall and a majority of the court deprecated the practice and held that in the United States, such property could not be confiscated without a special legislative enactment *ad hoc*, for by the Constitution the power to "make rules concerning captures on land and water" vests in Congress.

Yet, notwithstanding this decision, Congress, in 1846, in declaring the existence of a state of war with the Republic of Mexico (9 Stats. at Large, p. 9), again omitted any specific reference to the treatment of enemy property, and the United States District Court, following the *Brown* case, again refused to condemn an enemy vessel found in an American port. (*The Juanita*, Newberry, p. 352). In that case it was expressly laid down that such private property was under the protection of American law.

In 1861, although the war then being initiated was a civil war, and the insurrectionists were considered rebels, the United States expressly stipulated that the ships of these rebellious citizens be given fifteen days to make good their withdrawal from the ports of the loyal sections of the country (Act of July 10, 1861, 12 Stats. at Large 257).

So, in 1898, upon the occasion of the war with Spain, the President by proclamation specifically granted a period of immunity of 30 days to hostile vessels overtaken in port by the outbreak of war. Not only did this indulgence far exceed that granted by the enemy, but its liberality is remarkable among all instance of "days of grace." (See the *Buena Ventura*, 175 U. S. 384.)

Perhaps the most exhaustive declaration of American policy with respect to enemy ships in port on the outbreak of war is to be found in the position taken by the American delegation to the Second Hague Conference in 1907 with repect to the Sixth Hague Convention, which was designed to insure immunity from confiscation to enemy ships in port on the outbreak of war.

The Sixth Hague Convention, which was adopted by most of the powers of Europe as a rule of international law, provided in Articles 1 and 2:

"ARTICLE I.

"When a merchant ship belonging to one of the belligerent powers is at the commencement of

hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated.

"The same rule should apply in the case of a ship which has left its last port of departure before the commencement of the war and entered a port belonging to the enemy while still ignorant that hostilities had broken out.

"ARTICLE 2.

"A merchant ship unable, owing to circumstances of *force majeure*, to leave the enemy port within the period contemplated in the above article or which was not allowed to leave, *can not be confiscated*.

"The belligerent may duly detain it, without payment of compensation, but subject to the obligation of restoring it after the war *or requisition it on payment of compensation*." (Foreign Relations 1907, 1248.)

The American delegation did not sign this convention (Foreign Relations 1907, pp. 1158-60), *because it did not go far enough*. They desired to have the *positive rule of law* confirmed, which the American practice, in their view, had established, that there was an absolutely binding obligation (and not merely a privilege) on every maritime power under all circumstances not to confiscate merchant ships found in port on the outbreak of war, and to give them the same liberal treatment that our traditional policy had established. The report of the American delegation in justification of their refusal to sign the Hague convention because it did not go far enough, is as follows (Foreign Relations 1907, p. 1158):

"The uninterrupted practice of belligerent powers since the outbreak of the Crimean War has been to allow enemy merchant vessels in

their ports at the outbreak of hostilities to depart on their return voyages. The same privilege has been accorded to enemy merchant vessels which sailed before the outbreak of hostilities to enter and depart from a belligerent port without molestation on the homeward voyage. *It was therefore the view of the American delegation that the privilege had acquired such international force as to place it in the category of obligations.* Such, indeed, was the view of a majority of the conference; but as the delegation of Great Britain adhered to the opinion that such free entry and departure *was a matter of grace or favor*, and not one of strict right, the articles regard it as a delay by way of favor and refer to the practice as desirable.

"In support of the American view, the case of the *Buena Ventura* is in point. This case was decided in 1899, and in his opinion Justice Peckham says:

> 'It being plain that merchant vessels of the enemy carrying on innocent commercial enterprises at the time or just prior to the time when hostilities between the two countries broke out would, *in accordance with the later practice of civilized nations, be the subject of liberal treatment by the Executive*, it is necessary when his proclamation has been issued which lays down rules for treatment of merchant vessels *to put upon the words used therein the most liberal and extensive interpretation of which they are capable;* and where there are two or more interpretations which possibly might be put upon the language, *the one that will be most favorable to the belligerent party, in whose favor the proclamation is issued, ought to be adopted.*
>
> 'This is the doctrine of the English courts, as exemplified in the *Phoenix* (Spink's Prize Cases, 1, 5) and the *Argo* (Id., p. 52). It is the doctrine which this court believes to be proper and correct. The *Buena Ventura*' (175 U. S., 388).

"At the first reading, the convention seems to confer a privilege upon enemy ships at the outbreak of war. Free entry and departure are provided for, ships are not to be molested on their return voyages, *and a general immunity from capture is granted to vessels from their last port of departure, whether hostile or neutral.* But all these immunities are conditioned upon ignorance of the existence of hosilties on the part of the ship. *This condition forms no part of the existing practice, and it was the opinion of the delegation that it substantially neutralized the apparent benefits of the treaty* and puts merchant shipping in a much less favorable situation than is accorded to it by the international practice of the last 50 years.

* * * * *

"The convention also presents an undesirable alternative in the treatment of enemy merchant ships, in that it provides that in certain cases they may be seized 'subject to restoration after the war without indemnity' or to 'immediate requisition with indemnity.' As merchant marine commerce is carried on it is obvious that the condition of the cargo which is detained in indifferent or inefficient custodianship during the ordinary duration of war would approach confiscation. It would also be substantially impossible to make such a risk the subject of a practicable contract of insurance.

"The foregoing convention was not signed by the delegation, and its acceptance as a conventional obligation is not recommended."

The American official policy in this matter is reflected in the provisions of the United States Naval Code of 1900, in which it is provided that merchant ships in port on the outbreak of war "shall be allowed thirty days after war has been begun" to depart from the United States, free from molestation, detention or capture. The Naval Code provides, article 15:

"Merchant vessels of the enemy that have sailed from a port within the jurisdiction of the United States, prior to the declaration of war, shall be allowed to proceed to their destination, unless they are engaged in carrying contraband of war or are in the military service of the enemy.

"*Merchant vessels of the enemy, in ports within the jurisdiction of the United States at the outbreak of war, shall be allowed thirty days after the war has begun to load their cargoes and depart, and shall thereafter be permitted to proceed to their destination,* unless they are engaged in carrying contraband of war or are in the military service of the enemy."

With the American practice in mind, Mr. Hyde, lately Solicitor for the Department of State, declares (*International Law*, v. II, p. 522):

"Provision for the detention, or requisition on compensation, of enemy vessels in port, in lieu of confiscation, is a mark of respect for private property which should enjoy universal approval. That respect is not lessened when a detained ship is either appropriated or destroyed, *provided the owner is reimbursed for what he has lost in consequence of such action.*"

With respect to the wider doctrine of the immunity from capture of private property *at sea*, the United States has established a traditional policy which *a fortiori* evidences the fact that in taking over the ships *in our ports* at the outbreak of the war, we did nothing but requisition them, a theory which inevitably contemplates compensation.

As early as 1783, four years before the adoption of the Constitution of the United States, Benjamin Franklin had proposed the insertion in the first treaty with Great Britain of a provision permitting unarmed vessels employed in commerce "to pass freely unmolested." (See Address of Mr. Choate at Second Hague Peace Confer-

ence, Deuxième Conférence, Actes et Documents III, 768).

In 1785, practically these exact words were embodied in the treaty with Prussia, negotiated by Franklin, Jefferson and John Adams (Article 23, Malloy's Treaties, Conventions, etc., v. II, 1484). In 1823 President Monroe, in his Annual Message to Congress said that our Ministers in France, Russia and Great Britain had been instructed to urge the immunity of private property of an enemy upon the seas as "a permanent and invariable rule in all future maritime wars." (*Annual Register*, 1823, p. 1852). In 1826, the United States delegates to the Panama Conference received similar instructions (see Address of Mr. Choate, cited *supra*). When the United States was invited to give its adhesion to the Declaration of Paris in 1856, it declined on the ground that the declaration was too restricted in that it failed to include the exemption of enemies' ships as well as their goods in neutral vessels. (See Correspondence between U. S. and Powers represented in the Congress of Paris, pp. 11, 12, 16.) Such an exemption was contained in a treaty negotiated between the United States and Italy in 1871. (Malloy's Treaties, Conventions, etc., v. I, 969, 975.)

President McKinley in 1898, and President Roosevelt in 1903, each brought the matter to the attention of Congress, with the result that, on the 28th day of April, 1904, Congress adopted the following Resolution:

> "That it is the sense of the Congress that it is desirable in the interest of uniformity of action by the maritime states of the world in time of war, that the President endeavor to bring about an understanding among the principal maritime powers with a view to incorporating into the permanent law of civilized nations the principle of the exemption of all private property at sea, not contraband of war, from capture or destruction by belligerents."

In the meantime the United States delegates to the First Peace Conference at the Hague in 1899 received the following instructions from Mr. John Hay, Secretary of State:

> "Since the Conference has its chief reason of existence in the heavy burdens and cruel waste of war, which nowhere affect innocent private persons more severely or unjustly than in the damage done to peaceable trade and commerce especially at sea, the question of exempting private property from destruction or capture on the high seas would seem to be a timely one for consideration.
>
> "As the United States has for many years advocated the exemption of all private property not contraband of war from hostile treatment, you are authorized to propose to the Conference, the principle of extending to strictly private property at sea the immunity from destruction or capture by belligerent powers, which such property already enjoys on land, as worthy of being incorporated in the permanent law of civilized nations."

(Instructions and Reports of U. S. Delegates to Hague Peace Conference (Scott) p. 9.)

The delegates had difficulty in bringing this proposal before the Conference, but finally did so, and in its sixth Resolution:

> "The conference expresses the wish that a proposition having for its object the decree of immunity of private property in war on the high seas should be referred for examination to another conference."

In conformity with this 'wish" the American delegates in 1907 again urged upon the Conference the adoption of the proposition in the following terms:

> "The private property of all citizens or subjects of the signatory powers, with the exception

> of contraband of war, shall be exempt from capture or seizure on the sea by the armed vessels or by the military forces of any of the said signatory powers. But nothing herein contained shall extend exemption from seizure to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of any of the said powers."

(Deuxième Conférence. Actes et Documents III, 766. See also General Report of the Fourth Commission to the Hague Conference, *Ibid.*, I, 245-249.)

While the United States has not succeeded in obtaining adherence to its enlightened views with respect to the immunity of private property *at sea*, the principle that ships in port are exempt from capture and can only be captured after the grant of days of grace for departure, is adopted by practically every maritime nation, and by the uniformity of the custom the practice must be regarded as a rule of international law.

When Mr. Choate addressed the second Hague conference in 1907, in urging upon the conference the adoption of the American principle, he stated that "to despoil innocent and unoffending merchants who are taking no part in the war, savors of the savagery of ancient war." (Acts and Documents of the Second Hague Conference, Vol. 3, p. 774.)

On the outbreak of the recent war, France and Germany, France and Austria, and Great Britain and Austria, as well as most of the smaller nations, all found it mutually possible to grant "days of grace," and the failure of the arrangement between Great Britain and Germany was only due to a delayed telegram and resulted merely in the "detention" of German vessels in British ports, without a thought of confiscation. It can hardly therefore be supposed that the United States, in taking "possession and title" to the German ships in our harbors, was exercising the power of confiscation. (See on

this subject, the essay of Eleanor Wyllys Allen, Enemy Ships in Port on the Outbreak of War, Carnegie Endowment 1921, to which the writer is indebted for much of the material in this section.)

But that the policy and traditions of the United States with respect to private enemy property of all kinds within the jurisdiction of the United States is established beyond question or doubt, is evidenced by the Government's own brief in the case of *United States* v. *Chemical Foundation*, pages 188 to 209, to which reference has already been made. The Government has itself made it unmistakably clear that the United States has always opposed confiscation of enemy private property within the jurisdiction of the United States in any form. To seek to assert the contrary, by snatches from *dicta* as to the *physical power* of the United States to confiscate, if it saw fit, is neither consistent nor material. The fact is that this Government has from the beginning of its history vigorously opposed confiscation, and in the Resolution of May 12, 1917, Congress clearly evidenced the intention not to confiscate, but on the contrary, to provide for compensation. The Government's brief in the Court of Claims in C-576, p. 21, is correct in saying that "compensation and confiscation are wholly inconsistent, and there would be no confiscation if compensation is provided."

As early as 1783 and 1794, we had occasion to assume a position on this subject, and to our national credit it was adopted with but little hesitation. During the Revolutionary War, several states of the United States had endeavored to confiscate the private property and debts of British subjects. By Treaty of 1783, it was agreed that these British subjects were to be restored to their rights. The states proving unable or unwilling to make this restoration, the federal government under the Treaty of 1794 paid to Great Britain 600,000 pounds sterling because of its inability

to enforce upon the states compliance with the Treaty of 1783.

Alexander Hamilton, in commenting in his Camillus Letters XVIII on the Tenth Article of the Jay Treaty, said in part:

> "No powers of language at my command can express the abhorrence I feel at the idea of violating the property of individuals, which in an authorized intercourse in time of peace has been confided to the faith of our government and laws, on account of controversies between nation and nation. In my view every moral and every political sense unite to consign it to execration."

The legal, moral and practical justifications for the sancitity of the private property of foreigners even in case of war were elaborated by Hamilton in his Camillus Letters XIX, as follows:

> "The right of holding or having property in a country always implies a duty on the part of its government to protect that property, and to secure to the owner the full enjoyment of it. Whenever, therefore, a government grants permission to foreigners to acquire property within its territories, or to bring and deposit it there, it tacitly promises protection and security.
>
> "There is no parity between the case of the persons and goods of enemies found in our own country and that of the persons and goods of enemies found elsewhere. In the former there is a reliance upon our hospitality and justice; there is an express or implied safe conduct; the individuals and their property are in the custody of our faith; they have no power to resist our will; they can lawfully make no defense against our violence; they are deemed to owe a temporary allegiance; and for endeavoring resistance would be punished as criminals, a character inconsistent with that of an enemy. To make them a prey is, therefore, to infringe every rule of generosity and equity; it is to add cowardice

to treachery. In the latter case there is no confidence whatever reposed in us; no claim upon our hospitality, justice, or good faith; there is the simple character of an enemy, with entire liberty to oppose force to force.

"Moreover, the property of the foreigners within our country may be regarded as having paid a valuable consideration for its protection and exemption from forfeiture; that which is brought in commonly enriches the revenue by a duty of entry. All that is within our territory, whether acquired there or brought there, is liable to contributions to the treasury, in common with other similar property. Does there not result an obligation to protect that which contributes to the expense of its protection? Will justice sanction, upon the breaking out of a war, the confiscation of a property, which during peace serves to augment the resources and nourish the prosperity of a state?

"*The property of a foreigner placed in another country, by permission of its laws, may justly be regarded as a deposit, of which the society is the trustee. How can it be reconciled with the idea of a trust, to take the property from its owner, when he has personally given no cause for its deprivation?*"

Ever since 1783, the position of the United States has been unalterable, namely, that private property on land is inviolable in time of peace or war, and our Treaty with Prussia, if Treaty were needed, was designed to insure adherence to the principle. As is well known, we have even gone so far as to advocate the immunity from capture of private property at sea, and by the weight of our influence, have secured considerable support for this proposal. If we were now to revert to the middle age practice, now clearly violative of international law, of confiscating private property, which would be the inevitable result of failing to pay for these vessels, we would be stultifying our national professions from the beginnings of our history.

As early as 1796, in the case of *Ware* v. *Hylton*, 3 Dallas 199, the Supreme Court of the United States had occasion to express itself on the policy of confiscation of private property. Justice Patterson in that case pointed out that even at that date the rule was considered "as a relic of barbarism" * * * "it ought not to have existed among any nations and perhaps is generally exploded at the present day in Europe." He added, speaking of confiscation, "the gain is at most temporary and inconsiderable; whereas the injury is certain and incalculable and the ignominy great and lasting." Justice Wilson, at page 281, remarks that "the practice of confiscation has long been considered disreputable."

Chief Justice Marshall in the famous case of *Brown* v. *United States* (1814), 8 Cranch 122, not altogether removed from the influence of the eighteenth century and of the fact that he had been the attorney for Hylton in *Ware* v. *Hylton*, and therefore had to defend the validity of a title derived through an act of confiscation of the State of Virginia, made the following statement:

> "Respecting the power of government, no doubt is entertained. That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigation of this rigid rule which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right but cannot impair the right itself. * * * Although in practice vessels with their cargoes found in port at the declaration of war may have been seized, *it is not believed that modern usage would sanction the seizure of the goods of an enemy on land which were acquired in peace in the course of trade.* Such a proceeding is rare, and would be deemed a harsh exercise of the rights of war."

He added that no nation could now (1814) exercise such a right "without obloquy."

It will not, however, be difficult to show that if the exercise of a right is "affected," it is hardly possible to speak of the right itself as legal, for if the right cannot be lawfully exercised, it is no right at all. No one has pointed this out more clearly than John Bassett Moore, the greatest living authority on international law, whose views as to the propriety of confiscation have not been left doubtful. In discussing Marshall's professed distinction between a right and the exercise of a right, he has made the following remarks:

> "Referring to the practice of nations and the writings of publicists, he declared that, according to 'the modern rule, tangible property belonging to an enemy and found in the country at the commencement of war, ought not to be immediately confiscated'; that 'this rule' seemed to be 'totally incompatible with the idea that war does of itself vest the property in the belligerent government'; and consequently, that the declaration of war did not authorize the confiscation. Since effect was thus given to the modern usage of nations, it was unnecessary to declare, as he did in the course of his opinion, that 'war gives to the sovereign full right to take the persons and confiscate the property of the enemy, wherever found, and that the 'mitigation of this rigid rule which the humane and wise policy of modern times has introduced into practice' though they 'will more or less affect the exercise of this right,' 'can not impair the right itself.' Nor were the two declarations quite consistent. *The supposition that usage may render unlawful the exercise of a right, but can not impair the right itself, is at variance with sound theory.* Between the effect of usage on rights, and on the exercise of rights, the law draws no precise distinction. A right derived from custom acquires no immutability or immunity *from the fact that the practices out of which it grew were ancient and barbarous.* We may, therefore, ascribe the dictum in question to the influence of preconceptions, and turn for the

> true theory of the law to an opinion of the same great judge, delivered twenty years later, in which *he denied the right of the conqueror to confiscate private property,* on the ground that it would violate 'the modern usage of nations *which has become law.*' (*United States* v. *Percheman,* 7 Peters, 51.)" (Italics ours.) (Moore's Digest of International Law, VII, 312-313.)

Chief Justice Marshall himself, whatever hesitation he may have experienced in 1814 in denouncing the illegality of confiscation, had no doubt on the subject in 1833 when he had occasion to decide the case of *United States* v. *Percheman,* 7 Peters 51. In that case he said:

> "It may not be unworthy of remark that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. *The modern usage of nations, which has become law, would be violated;* that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. * * * If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory?"

Expressions by Mr. Justice Strong in the case of *Miller* v. *the United States,* 11 Wall 268, dealing with the Confiscation Acts passed by Congress in 1861 and 1862 as a punishment for treason of adherents to the Confederate cause, seek to justify the acts in part on the ground that they might have been justifiable against public enemies. Congress, however, passed the acts not as confiscations of the property of public enemies, but as penalties for treason, and reference has already been made to the Government's own explanation of these Civil War Acts in its brief in the *Chemical Foundation*

case. The unsoundness of using the Confiscation Acts of 1861 and 1862 as precedents or analogies for the confiscatory treatment of the private property of foreign enemies in a foreign war is clearly pointed out by Mr. Hyde in his recent work on International Law (v. II, 238). Mr. Justice Strong paid practically no attention to the development of the law as outlined above in the decisions of Chief Justice Marshall. In that same case Justice Field admitted that Congress under its war powers was bound by international law, and it is not now to be doubted that the confiscation of private property is a violation of international law. Justice Field at page 316 of that case said:

> "The power to make rules concerning captures on land and water is a power to make such rules as Congress may prescribe *subject to the condition that they are within the laws of nations.*"

It has already been emphasized that the vessels in this case were not "captured" at all, but taken over under eminent domain.

The principle that private property is immune and inviolable in time of war has been laid down in other cases, subquent to Marshall's time. For example, in *Hanger* v. *Abbott* (1876) 6 Wallace 532, the court characterized the practice as "condemned by the enlightened conscience and judgment of modern times."

The quotation from Wheaton on page 18 of the Government's brief in the Court of Claims in C-576 deals with property "captured from the enemy," which is not the case with the requisitioned ships here in question. The Government might, with more appropriateness, have cited the extract from Wheaton, 5th Ed., pp. 531-532, which the Government itself cited to the Court in the *Chemical Foundation* suit (Government's brief, p. 575) and the validity of which the Court, in its decision, in no way

denied. Speaking of "the modern usage of nations, which had acquired the force of law," Wheaton says: "Private property also came to be regarded as immune from confiscation with the exception of such as might become booty, in special cases, *when taken from enemies in the field or in besieged towns, and of military contributions levied upon the inhabitants of the hostile territory.*" It will be noted that the exception does not cover private property *within the jurisdiction*, which is institutionally immune from confiscation. The Government cites in support of the principles of immunity, Vattel's Law of Nations, Chitty's Ed., 1863, p. 318, Taylor, Public International Law, 1901, v. I, p. 547 and Wilson, Int. Law, Sec. 117, p. 283 and then quotes Article 47 of the Hague Convention of 1907 on the laws and customs of war, reading:

> "Family honor and rights, the lives of persons *and private property*, as well as religious convictions and practice, must be respected. *Private property cannot be confiscated.*"

The immunity of private property has been regarded as one of the most settled rules of international law. The United States helped to establish the enlightened practice and should be the last country to abandon it and its own traditions. It cannot do so without placing an incalculable blot on the national reputation and without impairing the integrity of all foreign investments hereafter, both of foreigners in the United States and of American citizens abroad. It need hardly be added that practically every writer of authority on international law has regarded the inviolability of private property as a settled rule of law, and therefore binding on the United States. To quote from only one authority, the greatest of all, John Bassett Moore, in Vol. 7, page 306 of his monumental Digest of International Law, shows that whatever may

once have been the law, the confiscation of private property, like the enslavement or killing of women and children, is no longer the law. He says:

> "It is true that in certain early writers who reiterated the stern rules of the law of Rome, sweeping generalizations may be found in which the right is asserted on the part of enemies to seize all property and confiscate all debts. The same writers, upon the same authority, assert the lawfulness of treating all subjects of the belligerent as enemies, and as such of killing them, including women and children. These generalizations, even at the time when they were written, neither expressed nor purported to express the actual practice of nations, and it is superfluous to declare that the law of the present day is not to be found in them; for, with the change in the practice of nations, growing out of the advance in human thought, the law also has changed."

Judge Moore adds (p. 308) after reviewing the authorities:

> "Finally, without unnecessarily multiplying authorities on a point which is undisputed, we may quote from Hall the following passage:
>
> 'Property belonging to an enemy which is found by a belligerent within his own jurisdiction, except property entering territorial waters *after* the commencement of war, may be said to enjoy a practical immunity from confiscation.'"

Mr. Hyde, the latest writer on the subject, adds that "it is unlikely that the United States would at the present time pursue a different course" (II, 239).

Only recently, the late Secretary of State, Mr. Hughes, gave expression to the national policy of abhorrence of confiscation, a policy which he deemed of universal validity and application. In his address at Philadelphia, Nov. 30, 1923, Mr. Hughes declared:

"States have duties as well as rights. Every State on being received into the family of nations accepts the obligations which are the essential conditions of international intercourse. Among these obligations is the duty of each State to respect the rights of citizens of other States which have been acquired within its jurisdiction in accordance with its laws.

"A confiscatory policy strikes not only at the interests of particular individuals but at the foundations of international intercourse, for it is only on the basis of the security of property, validly possessed under the laws existing at the time of its acquisition, that the conduct of activities in helpful cooperation is possible.

"Each State may have its code of laws in accordance with its conception of domestic policy, but rights acquired under its laws by citizens of another State it is under an international obligation appropriately to recognize. It is the policy of the United States to support these fundamental principles."

(e) The Prevailing Rules of International Law.

The prevailing rule of international law, which is even less rigorous than the rule which the United States by policy and uniform practice had made binding upon itself, forbids the confiscation of ships in port on the outbreak of war.

Down to the Crimean War, when Turkey advocated and adopted as a principle the rule that merchant vessels owned by subjects of the enemy state should be permitted to depart unmolested and should not be confiscated, it had been more or less common practice to lay an embargo on such vessels and to condemn them, as captured enemy property, in prize courts. The practice which Turkey initiated as a principle and which conformed to the practice of the United States from the beginning, change the law of Europe, until

now it may be said that the universal rule of modern times is to give immunity to vessels in port on the outbreak of war.

John Bassett Moore in v. VII, p. 453 of his Digest of International Law, makes the following statement:

> "It was formerly the practice not only to seize enemy vessels in port at the outbreak of war, but also to lay an embargo upon them in expectation of war, so that, if war should come, they might be confiscated. A *rule of precisely the opposite effect has been enforced in recent wars.*"

Charles Cheney Hyde, sometime Solicitor for the Department of State, in his recent work on International Law, v. II, p. 516, says:

> "The uninterrupted practice of belligerent powers from the outbreak of the Crimean War down to 1907, when the Second Hague Peace Conference convened, was to allow enemy merchant vessels in their ports at the outbreak of hostilities to depart on the return voyages."

Reference has already been made to Chief Justice Marshall's rule of interpretation in the *Charming Betsy*, 2 Cranch 64, appropriately cited approvingly by the Government in its brief in the *Chemical Foundation* case (p. 196) to the effect that " an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." Mr. Justice Peckham in applying, for the United States Supreme Court, the proclamation of President McKinley in 1898 to the case of the *Buena Ventura*, 175 U. S. 384, adopted a similar rule of construction. He said that inasmuch as enemy merchant vessels engaged in innocent commercial enterprises at the time of, or prior to the outbreak of hostilities, "would, in accordance with the later practice of civilized nations,

be the subject of liberal treatment by the Executive," it became necessary, upon the issuance of a proclamation respecting the treatment of merchant vessels, "to put upon the the words used therein the most liberal and extensive interpretation of which they are capable," and that where there were two or more interpretations which possibly might be put upon the language, the one which would be most favorable to the belligerent party in whose favor the proclamation was issued ought to be adopted. This was but an application of the doctrine of the English courts. Mr. Hyde comments upon the decision in the *Buena Ventura* by saying (p. 517):

> "It is not without significance that the Court based its interpretation of the exemption claimed, partly upon the historic attitude of the United States in favor of mitigating, as to all non-combatants, the hardships and horrors of war, and partly also upon the so-called later practice of civilized nations."

Can it be doubted, therefore, in the light of the traditional policy of the United States and of the universal rule of international law prevailing since 1854, that the Joint Resolution of May 12, 1917 is to be interpreted according to its plain meaning as a measure of requisition, under eminent domain, assuring to the owners their right to compensation, and not in a sense contrary to the traditional American policy of leaving private property within our jurisdiction immune from confiscation? To hold, as the Government seems to argue, that the Act of Congress authorizing the President to take over to the United States "possession and title" to the ships in our ports for the use of the Government, was an act of confiscation, is not only to do violence to the language of the Joint Resolution but is to stultify the national history.

Mention has already been made of the United States Naval Code of 1900 which expressly provided that enemy merchant ships found in our ports on the outbreak of war were to be permitted freely to depart. That code provides:

> "Art. 15. Merchant vessels of the enemy that have sailed from a port within the jurisdiction of the United States, prior to the declaration of war, shall be allowed to proceed to their destination, unless they are engaged in carrying contraband of war or are in the military service of the enemy.
>
> "*Merchant vessels of the enemy, in ports within the jurisdiction of the United States at the outbreak of war, shall be allowed thirty days after war has begun to load their cargoes and depart,* and shall thereafter be permitted to proceed to their destination, unless they are engaged in carrying contraband of war or are in the military service of the enemy."

Reference has also been made to the Sixth Hague Convention, dealing specifically with the treatment to be accorded ships in port on the outbreak of war, Article II of which forbade the confiscation of a merchant ship unable "owing to circumstances of '*force majeure*,' to leave an enemy port within the period of grace allowed, or which was not allowed to leave" (*supra*, p. 52).

Reference has also been made (*supra*, p. 52) to the report of the American delegates to the Second Hague Conference who declined to sign the Sixth Convention, not because the policy of immunity from confiscation was not approved, but because in their opinion it did not go far enough and was below the standard of the American rule which gave full and absolute immunity under all circumstances to private enemy ships in port on the outbreak of war.

In view of these positions of the United States, adopted as a traditional policy, is it possible for an

American court to find that Congress in 1917 undertook to confiscate enemy and other merchant ships to which they authorized the President in the national interest to take "possession and title?"

It will require only a few citations of authority to show that the modern rule of international law, which the practice of the United States has not only confirmed, but exceeded, exempts merchant vessels in port from confiscation.

The Institute of International Law in its rules for the conduct of war adopted at the 1898 meeting, provided, Article 41:

> "Merchant vessels compelled by *force majeure* to take refuge in an enemy port, may not be captured therein. They shall be required, during their stay, to conform exactly to the stipulations of the local authority, and to put to sea again within the period that shall be indicated to them." (Annuaire, 1898, p. 154.)

At its 1913 meeting, the Institute adopted the following rule:

> "Article 36. *Extenuation of the principle of capture.* When a * * * private vessel belonging to one of the belligerent powers is, at the commencement of hostilities, in an enemy port, it is allowed to depart freely, immediately or after a reasonable number of days of grace, and to proceed, after having been furnished with a passport, to its port of destination, or to any other port indicated" (Annuaire, 1913, p. 182).

Reference has been made to the declarations of John Bassett Moore and Mr. Hyde to the effect that in every war since the Crimean enemy vessels have been permitted either to depart or have been requisitioned on payment of compensation. It will be unnecessary to cite the relevant documents. They will be found in the Government publication, "Laws of Maritime Warfare,"

prepared by Harold H. Martin and Joseph R. Baker, in May, 1918 (G. P. D., 1918) pp. 21 *et seq.* They establish that confiscation has become obsolete and universally discredited, by no nation more emphatically than by the United States.

Perhaps it may serve a useful purpose in summing up the prevailing rule of international law on the subject, to quote from one of the most celebrated of the modern authorities on international law, John Westlake. At page 42 of v. II of his notable work on International Law, Westlake declares:

> "All ships and cargoes in the harbours of the territory at the outbreak of war, belonging either to the enemy state or to enemy subjects, were seized *under the old law* for the profit of the state, in England by the name 'droits of admiralty'; and this claim was enforced by the British Government as late as the outbreak of war with Denmark in 1807. Indeed it was not unusual to lay an embargo on ships belonging to subjects of a power with which war was imminent in order to detain them within reach of seizure. *But since the middle of the nineteenth century it has been the constant practice in declarations of war to name a time within which enemy merchant ships then in harbour may load and depart;* and it is usual to add that enemy merchant ships which have sailed from a foreign port before the date of the declaration may enter and discharge their cargoes, and then depart with freedom from molestation on their voyage to any port not blockaded. *This, combined with the growing tendency of opinion to favour private enemy property even at sea, may be considered to have made it certain that merchant ships and cargoes in harbour at the outbreak of war* and not belonging to the enemy *state,* with the exception of ships of which the construction indicates that they are intended to be converted into ships of war, *would not again be confiscated.*"

The modern rule and its evolution could not be more clearly expressed than it thus is by Professor Westlake.

While the present claim in no sense rests upon an alleged violation of treaty, it cannot be said to be weakened by the fact that the allegation of confiscation, if sustained, would constitute a radical violation of the treaties with Germany, whereas the claimant's contention, that Congress requisitioned the vessels under its power of eminent domain, implying compensation, would make the Resolution of Congress at least not seriously inconsistent with the treaty. If at all possible—and it is in this case easily possible—a construction should be given to an act of Congress which would not violate the solemn treaty promises of the nation.

By article 6 of the treaty with Prussia of 1785:

> "It is agreed that the subjects or citizens of each of the contracting parties, their vessels and effects shall not be liable to any embargo or detention on the part of the other, for any military expedition or other public or private purpose whatsoever."

By. Art. 23, it is provided further that:

> "If war should arise between the two contracting parties, the merchants of either country then resident in the other shall be allowed to remain nine months to collect their debts and settle their affairs, and may depart freely, carrying off all their effects without molestation or hindrance * * * And all merchant and trading vessels employed in exchanging the products of different places, and thereby rendering the necessaries, conveniences and comforts of human life more easy to be obtained, and more general shall be allowed to pass free and unmolested. * * *"

This treaty expired by its own limitation in October, 1796.

The treaty of 1799 alters the above provisions. Art. 18 reads:

> "If the citizens or subjects of either party, in danger from tempests, pirates, enemies, or other accidents, *shall take refuge, with their vessels or effects*, within the harbors or jurisdiction of the other, they shall be received, protected and treated with humanity and kindness, and shall be permitted to furnish themselves, at reasonable prices, with all refreshments, provisions and other things necessary for their sustenance, health and accommodation, and for the repair of their vessels."

Art. 23 is to the following effect:

> "If war should arise between the two contracting parties, the merchants of either country then residing in the other shall be allowed to remain nine months to collect their debts and settle their affairs, and may depart freely, carrying off all their effects without molestation or hindrance. * * *"

This treaty expired June 22, 1810, but the above articles were expressly revived by Art. 12 of the treaty of 1828, which was to remain in force for twelve years:

> "and if twelve months before the expiration of that period neither of the High Contracting Parties shall have announced, by official notification to the other its intention to arrest the operation of said Treaty, it shall remain binding for one year beyond that time, and so on, until the expiration of the twelve months which will follow a similar notification, whatever the time at which it may take place" (Art. XV.)

By article 24 the treaty was made expressly applicable to the contingency of war arising between the two contracting parties.

Here it may be said that the suggestion or construction of the Supreme Court in *Stoehr* v. *Wallace*, 255 U. S. 239, that the Treaty only protected the property of resident Germans, is discredited by John Bassett Moore, the most eminent authority on our treaties. In this connection, Judge Moore (International Law and Some Current Illusions and other essays, pages 20 and 21) says:

> "It would be an idle task minutely to analyze the language of the foregoing treaties in order to ascertain whether some particular confiscation might be enacted without flagrant violation of their precise terms. St. Paul's well-known proverb, that 'the letter killeth but the spirit giveth life,' (Corinthians, II, Chap. 3, Verse 6) is equally expressed in the legal maxim *qui haeret in litera haeret in cortice*, meaning that 'he who considers merely the letter of an instrument goes but skin-deep into its meaning.' (Broom's Legal Maxims, 8th ed., p. 533, citing Coke's Littleton, 283 b). No doubt their phraseology may in some instances have been specially designed, like the terms of criminal statutes, to prevent the repetition of particular odious acts. But, without regard to the words employed and their literal interpretation, there can be no doubt that they were understood to emanate from the general rule against confiscation, which it was not supposed that the contracting parties would seek in any respect to infringe. Even by Magna Carta the pre-war property of enemies, though they were not themselves personally present, was not, simply as enemy property, subject to confiscation by the Crown." (F. E. Farrer, The Forfeiture of Enemy Private Pre-war Property: Law Quarterly Review, Vol. 37 (1921), pp. 218, 337, 353, 356.)

It would thus seem that, aside from the rules of international law and the uniform American practice and policy, the United States had by treaty committed

itself to permit the withdrawal within nine months of the outbreak of war of all forms of private property, owned by citizens of the enemy state. Only such a construction, therefore, of the Joint Resolution of May 12, 1917, as implies an expropriation of the private property, under payment of compensation, could be consistently tolerated. Otherwise, American tradition and policy would be but mere paper professions, subject to destruction at the first gust of an impassioned prejudice.

II.

As the taking of "possession and title" was not an act of confiscation, the only sustainable alternative is that it constituted an exercise of the power of eminent domain or requisition, and hence implied a promise to pay compensation.

It is believed that the exhaustive analysis just made of the Joint Resolution of May 12, 1917, by taking into account its express language, the declarations of Congress and of the Executive, the traditional policy of the United States with respect to private enemy property and the prevailing rules of international law, lead to the inevitable conclusion that Congress, in authorizing the President to take over to the United States for the public use the "possession and title" of the ships which had sought asylum in American harbors, was exercising, not the lawless power of confiscation, but the rightful power of eminent domain or requisition. If this is so, then it also unescapably follows that the taking involved an implied contract to pay compensation, and the action of Congress brings the case squarely within the terms of the Tucker Act.

The Government sought to show in the Court of Claims (Brief, p. 18 *et seq.*) that this case is one not

arising under the Constitution or an act of Congress, or on a contract, express or implied, but is one sounding in tort. The Court of Claims did not sustain the theory of tort, but nevertheless denied that the proceeding was "founded upon the Constitution or a law of Congress" and also denied that the taking of "possession and title" implied any obligation to pay compensation.

It is hard to conceive how the Joint Resolution of May 12, 1917 under which "possession and title" to these vessels were taken over to the United States is anything but an Act of Congress. The President acted rightfully, and not wrongfully, and so did Congress, so long as compensation for the taking is implied, as it must be. Congress in the very Resolution itself provided for the valuation of the vessels by a board of survey, and these values were to be considered as "competent evidence in all proceedings on any claim for compensation". Certainly it would be hard to make it any clearer that a claim for compensation, in judicial proceedings, was contemplated, and that Congress was making provision to facilitate such proceedings. If this does not imply the very opposite of confiscation or tort, then no words, it is believed, can have that effect. The very use of the word "compensation", shows that compensation was intended and implied, and as this case arises both out of a Joint Resolution and a contract, express or implied, it is clearly within the jurisdiction of the Court of Claims.

It must be recalled that as yet none of the owners or others interested in the property expropriated have had a hearing to determine whether the property was rightfully taken or to establish their interest. It would be most extraordinary if property in the United States can be taken from its owner by Act of Congress, without notice or opportunity for a hearing, before or after the event. Manifestly, Congress believed that in providing for a subsequent "claim for compensation," they were

supplying that necessary element of due process of law which is fundamental in American procedure.

In its attempt to show that the taking of "possession and title" to these vessels under a Joint Resolution of Congress is not a taking involving an obligation to pay compensation, the Court of Claims cites and quotes from several cases in which seizures of enemy property by military officers of the Government have been held to be torts. The Court fails to point out the very vital operative fact that all these seizures were made by military officers *in the field of military operations in enemy territory*, and hence naturally cannot give rise to an implied promise to pay. Nor were they made under a Joint Resolution or act of Congress, but on the discretionary order of a military officer on the spot. The vessels in this case were lying in ports of the United States, under protection of American public law, and were seized and requisitioned for public use. The private title was fully recognized by Congress, and the fact that the public use was war service or commercial service by the Shipping Board in no manner diminishes the implied, if not, indeed, express, intention and promise to pay for the private property thus taken.

Before examining some of the more well-known cases on the subject, it may be proper to allude to the cases cited by the Court of Claims to prove that the taking of "possession and title" to the vessels in the present case involved no promise to pay.

In the *Ribas y Hijo* case, 194 U. S. 315, the Supreme Court expressly says, in denying the implied promise to pay compensation for a vessel taken by the U. S. military forces on the capture of Ponce, Porto Rico, and used by them for a short time:

> "The seizure, which occurred while the war was flagrant, was an act of war, *occurring within the limits of military operations.*"

In the *Herrera* case, 43 Ct. Cls. 430, the capture was made by the American army in Spanish waters, near Santiago, Cuba. The Supreme Court (222 U. S. 558) points out the fact that Cuba was enemy's territory and that the vessel was seized in the course of military operations.

In *Juragua Iron Co.* v. *United States*, 212 U. S. 297, the building destroyed by order of General Miles was burned as a military measure because of the prevalence of yellow fever. Justice Harlan distinguishes the case from *United States* v. *Great Falls* and *United States* v. *Lynah*, presently to be discussed, and adds:

> "But can such a principle be enforced in respect of property destroyed by the United States in the course of military operations for the purpose, and only for the purpose, of protecting the health and lives of its soldiers actually engaged at the time in war *in the enemy's country*?"

That the Government is not unaware of the inapplicability of the *Juragua Iron Co.* case may be inferred from its comment upon that case in the Government's Reply Brief in the *Chemical Foundation* suit (p. 119) where it is said:

> "The first (*Juragua* case) involved property belonging, it is true, to an American corporation, but situated in Cuba and *in the zone of military operations* of the Spanish War. The property was destroyed by the military authorities for the protection of the Army. This presents an entirely different question."

So the *Moore* case, 10 Ct. Cl. 375 and the *Green* case, 10 Ct. Cl. 466, which the Court of Claims cites, are utterly inapplicable. Both involved the seizure of abandoned enemy property *in hostile territory in the course of military operations*, the former in North Caro-

lina, the latter in Nashville. In the latter case, the quotations printed in the Government's brief (p. 20) amply show that it has no bearing on the cases now before this Court. The court in the *Green* case said:

> "The seizure of the claimant's property was *not a taking of private property for public use*, but was to all intents and purposes a *military measure*, directed to the end of carrying on the war for suppressing the rebellion.
>
> "Our conclusion is that the Government is not liable upon implied contract to any person, loyal or disloyal, for property taken by its agents, civil or military, during the rebellion, *within the insurrectionary districts.* * * *"

Klein's case, 13 Wall. 128, *U. S.* v. *Anderson*, 9 Wall, 56, *Haycraft* v. *U. S.*, 22 Wall. 81 and *Lamar* v. *Browne*, 92 U. S. 187, also cited by the Court of Claims, are equally irrelevant. They have been considered by my colleagues in their briefs.

In the *Castello* case, 51 Ct. Cl. 221, the Court points out (p. 227):

> "It is sufficient to observe that the *military forces of the Government were actually engaged in the suppression of flagrant hostility* to the authority of the Government, and that the *officer in command of the forces* of the defendants seized the property of the claimant as enemy property under the belief that its possessor as well as the vessel itself was being employed in active aid of local revolution."

As already observed (*supra*, p. 11) the Court of Claims fails to make one of the most fundamental distinctions under the war power, constitutionally considered, as well as under international law, namely, the distinction between the destruction or seizure of property *in the actual course of military operations in enemy territory* and the appropriation of private prop-

erty within the state's own jurisdiction *in advance* of actual military operations, for subsequent use in military or other public service. The distinction is vital and elementary.

See:

Vattel, *Law of Nations*, Chitty-Ingraham ed., sec. 232, p. 402.

Bentwich, Private Property in War, London, 1907, p. 41.

H. Rep. 386, 22nd Cong., 1st Sess., pp. 9-10.

Lawrence's Report on Claims against Governments, H. Rep. 134, 43rd Cong., 2nd Sess., 126.

Nys, Droit International (1912 ed.) v. III, ch. XI, pp. 450-462.

With respect to the requisition of such private property within the jurisdiction of the United States for the public use no distinction has ever been made by the United States between the property of citizens and aliens, and it is apparent from the Joint Resolution of May 12, 1917 that Congress did not intend to make any such distinction in this case. On the contrary, it is evident from the Resolution and the entire debate that they contemplated that the owners, whatever their nationality, would be compensated.

The ships having been seized under an act of Congress there is an implied contract agreeing to compensate the owners thereof.

In the case of *United States* v. *Lynah*, 188 U. S. 445, the question was as to the jurisdiction of the Circuit Court under the Tucker Act on an action to recover of the United States the sum of $10,000 for the total destruction of real property as the necessary result of the acts of U. S. officers in improving navigation. In the course of his opinion Justice Brewer said (p. 464):

"The rule deducible from these cases is that when the government appropriates property which it does not claim as its own, it does so under an implied contract that it will pay the value of the property it so appropriates. It is earnestly contended in argument that the government had a right to appropriate this property. This may be conceded, but there is a vast difference between a proprietary, and a govermental right. When the government owns property, or claims to own it, it deals with it as owner and by virtue of its ownership, and if an officer of the government takes possession of property under the claim that it belongs to the government (when in fact it does not), that may well be considered a tortious act on his part, for there can be no implication of an intent on the part of the government to pay for that which it claims to own. Very different from this proprietary right of the government in respect to property which it owns is its governmental right to appropriate the property of individuals. All private property is held subject to the necessities of government. The rights of eminent domain underlies all such rights of property. The government may take personal or real property whenever its necessities, or the exigencies of the occasion demand. So, the contention that the government had a paramount right to appropriate this property may be conceded, but the Constitution in the 5th Amendment guarantees that when this government right of appropriation—this asserted paramount right—is exercised it shall be attended by compensation.

"The government may take real estate for a post office, a courthouse, a fortification, or a highway; *or in time of war it may take merchant vessels and make them part of its naval force. But can this be done without an obligation to pay for the value of that which is so taken and appropriated?* Whenever in the exercise of its governmental rights it takes property the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor. Such is

the import of the cases cited as well as of many others.

* * * * *

"Therefore, following the settled law of this court, we hold that there has been a taking of the lands for public uses and that the government is under an implied contract to make just compensation therefor" (p. 474).

In *Philippine Sugar Estates Development Co.* v. *United States* (40 Ct. Cl. 33), it appeared that the United States had taken possession of certain houses and grounds for the use of the Army, and in the course of the opinion in that case the court said:

"Without repeating more fully the general rules set forth in the original opinion of the court respecting the appropriation of private property and the obligation of the government to pay for the same, it is now enough to say that the promise of compensation would be implied had the government, not claiming to own the property, appropriated the same to its permanent use under the right of eminent domain."

In conclusion the court said:

"The President's order was supported by the constitutional obligation of the government to pay because of the circumstances under which the property was taken and its appropriation to the public use. (Fifth Amendment to the Constitution.) The order was also in line with the construction which created the obligation on the part of the government to reimburse the proper owners for property taken and used in emergent circumstances. (*United States* v. *Russell* 1872) 13 Wall. (U. S.) 628, 20 L. ed. 475. The emergency gave the right to take, and the emergency has been shown to exist which justified the taking."

In the case of *United States* v. *Russell*, 13 Wall. 623, the United States took into its service certain already

officered and manned steamers of a citizen of the United States, and the court said (p. 629):

> "Such a taking of private property by the government when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property is imperative and immediate, and the danger, as heretofore described, is impending, and it is equally clear that the taking of such property under such circumstances creates an obligation on the part of the government to reimburse the owner to the full value of the service. Private rights, under such extreme and imperious circumstances, must give way for the time to the public good, but the government must make full restitution for the sacrifice.
>
> "Beyond doubt such an obligation raises an implied promise on the part of the United States to reimburse the owner for the use of the steamboats and for his own services and expenses, and for the services of the crews during the period the steamboats were employed in transporting government freight pursuant to those orders. *Indebitatus assumpsit* is founded upon what the law terms an implied promise on the part of the defendant to pay what, in good conscience, he is bound to pay to the plaintiff, but the law will not imply a promise to pay unless some duty creates such an obligation, and it never will sustain any such implication in a case where the act of payment would be contrary to duty or contrary to law."
>
> "Tested by those rules it is quite clear that the obligation in this case to reimburse the owner of the steamboats was of a character to raise an implied promise on the part of the United States to pay a reasonable compensation for the service rendered, and if so, then it follows that the decree was properly made in favor of the plaintiff, unless it appears that the adjustment of the claim belonged to Congress or to the executive department, and not to the court of claims."

In the case of *Blake* v. *United States*, 275 Fed. 861, certain coal was requisitioned by the government under the National Defense Act, and the court said (p. 867):

> "In *United States* v. *Russell*, 13 Wall. 623, 20 L. Ed. 474, it was held that where the government, in emergencies, takes private property into its use, a contract to reimburse the owner is implied, and that the government is bound to make 'full compensation' to the owner."

In *United States* v. *Pacific R. R.*, 120 U. S. 227, the court held:

> "In what we have said as to the exemption of government from liability for private property injured or destroyed during war, by the operations of armies in the field, or by measures necessary for their safety and efficiency, we do not mean to include claims where property of loyal citizens is taken for the service of our armies, such as vessels, steamboats, and the like, for the transport of troops and munitions of war, or buildings to be used as store-houses and places of deposit of war material, or to house soliders or take care of the sick, or claims for supplies seized and appropriated. In such cases it has been the practice of the government to make compensation for the property taken. Its obligation to do so is supposed to rest upon the general principle of justice that compensation should be made where private property is taken for public use, although the seizure and appropriation of private property under such circumstances by the military authorities may not be within the terms of the constitutional clause. *Mitchell* v. *Harmony*, 13 How. 134; *U. S.* v. *Russell*, 13 Wall. 623."

In *Langford* v. *U. S.* 101 U. S. 341, the court held:

> "We are not prepared to deny that when the government of the United States, by such formal proceedings as are necessary to bind it, takes for

public use, as for an arsenal, custom-house, or fort, land to which it asserts no title, but admits the ownership to be private or individual, there arises an implied obligation to pay the owner its just value. It is to be regretted that Congress has made no provision by any general law for ascertaining and paying this just compensation. And we are not called upon to decide that when the government, acting by the forms which are sufficient to bind it, recognizes the fact that *it is* taking *private* property for public use, the compensation may not be recovered in the court of claims. On this point we decide nothing."

In *U. S.* v. *Great Falls Mfg.*, 112 U. S. 645, 656-657, 5 Sup. Ct. 306, 311 (28 L. Ed. 846), the court held:

"* * *. we are of opinion that the United States having by its agents, proceeding under the authority of an act of congress, taken the property of the claimant for public use, are under an obligation, imposed by the Constitution, to make compensation. *The law will imply a promise to make the required compensation, where property, to which the Government asserts no title, is taken pursuant to an act of congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the Government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract within the meaning of the statute, which confers jurisdiction upon the court of claims of actions founded 'upon any contract, express or implied, with the Government of the United States.'*

* * * * *

"Having abandoned the proceedings of condemnation, the proper officers of the government, in conformity with the Acts of Congress, constructed the dam from the Maryland shore to Conn's Island, the doing of which necessarily involved the occupation and use of the property, as contemplated in what was called the fourth plan for bringing water from the Great Falls to Wash-

ington and Georgetown. In such a case, it is difficult to perceive why the legal obligation of the United States to pay for what was thus taken pursuant to an Act of Congress, is not quite as strong as it would have been had formal proceedings for condemnation been resorted to for that purpose. If the claimant makes no objection to the particular mode in which the property has been taken, but substantially waives it, by asserting, as is done in the petition in this case, that the Government took the property for the public uses designated, we do not perceive that the court is under any duty to make the objection in order to relieve the United States from the obligation to make just compensation."

In *United States* v. *Buffalo Pitts Co.* (1914) 234 U. S. 228 the Supreme Court held, by Mr. Justice Day:

> "While the Government claimed the right to thus take and use the property, it nevertheless held it without denying the right of the owner to compensation. When it takes property under such circumstances for an authorized governmental use, it impliedly promises to pay therefor. This accords with the principles declared in the previous cases in this Court, and arises because of the Constitutional obligation embodied in the Fifth Amendment to the Constitution of the United States guaranteeing the owner of property against its appropriation for a governmental use without compensation."

Reference has already been made (*supra*, p. 13) to the statement by Mr. Justice Brandeis, speaking for this Court in *United States* v. *North American Transportation and Trading Co.*, 253 U. S. 330, 333:

> "When the Government, without instituting condemnation proceedings, appropriates for a public use, under legislative authority, private property to which it asserts no title, it impliedly promises to pay therefor. * * * In order that

> the Government shall be liable, it must appear that the officer who has physically taken possession of the property was duly authorized so to do, either directly by Congress or by the official upon whom Congress conferred the power."

The case of these ships and other maritime property taken over by the President under authority of Congress comes squarely within these rules.

In *Portsmouth Harbor Land & Hotel Co.* v. *United States* (1922) 260 U. S. 327, 330, a case much weaker on its facts than the case at bar, for in that case there was no enabling statutory authority, this Court, through Mr. Justice Holmes, said: "If the acts amounted to a taking without assertion of an adverse right, a contract would be implied whether it was thought of or not."

In *Duckett* v. *United States*, 266 U. S. 149, Mr. Justice Holmes for this Court pointed out that "acts" "determined the relations of the parties." He held that an implied promise to pay arose from the order proclaiming the taking of certain docks in that case. "Whatever the effect of the taking, there was a contract implied in fact by the President's order and there is no doubt concerning the jurisdiction of the Court of Claims." The order was even less emphatic as to compensation than is Section 2 of the Joint Resolution of May 12, 1917, here in issue.

A more recent application of the same rule that a taking of private property for the public use, under authority of Congress, constitutes an exercise of the power of eminent domain, and that from the taking there arises an implied promise to pay compensation, is to be found in Mr. Justice Butler's opinion, for the Court, in *Campbell* v. *United States*, 266 U. S. 368.

Contrary to the apparent belief of the Court of Claims, the Fifth Amendment is not suspended in the United States by the outbreak of war, and private

property, *in the United States*, even of alien enemies, enjoys the protection of the Constitution and of private and public law. It is doubtful whether Congress could by statute take away from such property the protection of the Constitution. But even if it could, it manifestly has not done so. On the contrary, all the evidence from all sources without exception, indicates that Congress intended to and did adhere to the enlightened traditions of the United States and the rules of international law by according to the private property of enemy citizens, and in particular, of the property here in issue, the fullest legal protection. So long as Congress has failed to take any confiscatory action, the property enjoys the same safeguards against being taken for public use without compensation as does any other property located in the United States. Ships in port are equally protected with property on land. Ordinarily, the value of these ships might have been turned over by the Navy Department, the Shipping Board, or the Treasury, to the Alien Property Custodian, to be held until the end of the war or until Congress acts under Section 12 of the Trading with the Enemy Act. But as timely demands were not served on these Departments, the only entitled claimants are the owners of the vessels.

It is submitted that in these cases the only possible alternative to confiscation, which no one would probably now assert, is expropriation or requisition under eminent domain. Such taking implies a promise to pay, and from the right to receive such compensation no owner, not even an alien or an alien enemy, is deprived. The latter's privilege of suit is suspended until the end of the war, but his substantive right is unimpaired. Unless the legal and political history of the United States is to be stultified, the owners of these expropriated vessels have a right to the com-

pensation which Congress in 1917 manifestly intended they should have. The only forum in which "proceedings" can be brought on their "claim for compensation" is the Court of Claims under its long-established jurisdiction, now codified in Section 145 of the Judicial Code.

III.

Nothing in the Knox-Porter Resolution, the Treaty of Versailles, or the Treaty of Berlin, prevents the payment of compensation for the requisitioned vessels.

In the Court of Claims the Government sought to show that the Knox-Porter Resolution and the Treaty of Berlin "carried into and incorporated in the substantive law of the United States" the provisions of the Treaty of Versailles on reparations, including article 297, Annex, paragraph 2, which, it was alleged, bars a German national from making any claim for property taken from him under any circumstances. The Court of Claims did not consider this question, but it deserves a passing discussion.

Apart from the questionable morality of such a contention, the Government's view that the Treaty of Versailles has been carried into the substantive law of the United States is quite erroneous. While it is true that the United States did, in the Knox-Porter Resolution (42 Stat. Part I 105) and in the Treaty of Berlin (42 Stat. Part II 1939) reserve to itself

> "all rights, privileges, indemnities, reparations, or advantages, together with the right to enforce the same, to which it * * * became entitled under the terms of the armistice signed November 11, 1918 * * *; or which were acquired by or are in possession of the United States of America by reason of its participation in the war or to which its nationals have thereby become rightfully en-

> titled; or which, under the treaty of Versailles, have been stipulated for its or their benefit, * * *"

the fact is, that none of these reservations can have any relation to the compensation to which, under the Joint Resolution of May 12, 1917, the owners of the ships here in question are by American public law entitled. In fact, any of these reservations of which we might desire to take advantage had to be specially designated by Congress or the political department of the Government. The reservations to which the Government in its brief below referred, relate to Parts VIII and X on reparations, from which it is a well-known fact that the United States has excluded itself. The settlement of our claims against Germany has been undertaken in a way directly contrary to the method provided for in the Treaty of Versailles. It would seem therefore most startling if the Government's position could be sustained, namely, that the Treaty of Versailles had by reference been "carried into * * * the substantive law of the United States." Only upon the United States electing to adopt the provisions of the Treaty of Versailles relating to reparations, and then only, of course, upon the assumption of the corresponding obligations involved in the acceptance of those articles, could the Treaty of Versailles, or any part thereof, be deemed binding on the United States.

Articles II of the Treaty of Berlin expressly provides that

> "the United States in availing itself of the rights and advantages stipulated in the provisions of that Treaty (of Versailles) mentioned in this paragraph *will do so in a manner consistent with the rights accorded to Germany under such provisions.*"

So Article IV of the Treaty of Berlin provides:

> "That, while the United States is privileged to participate in the Reparation Commission, ac-

cording to the terms of Part VIII of that Treaty, and in any other Commission established under the Treaty or under any agreement supplemental thereto, the United States is not bound to participate in any such commission unless it shall elect to do so."

No one has made the non-applicability to the United States of Article 297 of the Treaty of Versailles more clear than Professor Hessel Yntema in his study on the relation between the Treaty of Berlin and the Treaty of Versailles, published in the *Columbia Law Review* for June, 1923 (v. XXIII, p. 511). After analyzing the two treaties and the Knox-Porter Resolution, he draws the following conclusion as to the applicability of the Treaty of Versailles to the United States (pp. 523-524):

"Incongruously enough, it has been maintained that, in spite of its actual repudiation *in toto* by the United States, the Treaty of Versailles, exclusive of the portions specified in Article 2 of the Treaty of Berlin, has in effect been implicitly accepted and ratified by the United States through the adoption of the remaining portions in the same Article and the admission by the United States of their limiting as well as concessionary application to claims supported under the Treaty in which they are comprised. The contention proceeds upon the assumption that, by the partial adoption of the Treaty of Versailles *as an optional basis of American claims* and by the supposed fact that the claims which may be asserted as under that Treaty are coextensive with those which may be otherwise derived, the Treaty of Versailles is to be regarded as binding upon the United States except in so far as portions thereof have expressly been excluded in the Treaty of Berlin and it is concluded that the United States in urging any and all claims under the latter treaty must submit to such limitations as may be inferred from the unexcluded portions of the Treaty of Versailles.

It would indeed be passing strange if the Treaty of Versailles, after its complete repudiation by the Senate of the United States and by grace of the later amputation of provisions to which the United States was unwilling to accede, should then have virtually been ratified through the underground railway of the Treaty of Berlin. Yet such is the implication of the foregoing contention, which, in the absence of any express provision to the effect stated, is to be rejected on that very practical ground alone. Furthermore, the argument is in the face of the clear provision in Section 2 of the Joint Resolution of Congress of 2 July, 1921, primarily adopted in Article 1 of the Treaty of Berlin, that the rights and advantages stipulated for the benefit of the United States under the Treaty of Versailles are *'reserved'* to the United States, *the inference being that correlative obligations will be imposed upon the American Government only in the event and to the extent that its option to assert such rights and advantages is exercised.* In short, it cannot be too much emphasized that the Treaty of Versailles has been definitely refused the ratification of the United States and is, therefore, not binding upon the United States *proprio vigore.* The situation is rather that the substance of certain of its provisions are to be read into the Treaty of Berlin *conditionally upon the assertion of claims by the United States in accordance therewith.*"—(Italics ours).

With respect to Parts VIII and X of the Treaty of Versailles, dealing with reparations, on which the Government seems primarily to rely in its view that the provisions of that Treaty have been "carried into * * * the substantive law of the United States," it may be said that the United States is not in principle sharing in the reparation payments made and to to be made by Germany. Secretary of State Hughes, in his speech at New Haven, Conn. December 29, 1922, expressly de-

clared: "We are not seeking reparations." Moreover, it is public knowledge that the Allied Governments in the Spa Agreement of 1920 divided up the German reparations in certain proportions which completely excluded the United States.

Article 237 of the Versailles Treaty provides that German payments were to be divided by the Allied and Associated Powers in proportions which have to be determined upon by them in advance on a basis of general equity and of the right of each.

In practice the basis of distribution up to 93.5 per cent. was settled in July, 1920, at the Inter-Allied Conference at Spa.

According to the Fifth Report of the Reparation Commission, London, 1923, "a later agreement fixed the share of the Serb-Croat-Slovene State at 5 per cent., thus raising the total distributed to 98½ per cent.

The Official Summary of the Spa Agreement as printed in the Appendix to Keynes' "A Revision of the Treaty," London, 1922, p. 189, is as follows:

"I. The Spa Agreement, July, 1920.

(A) Summary of the Agreement upon Reparations between the Allies, signed by the British Empire, France, Italy, Japan, Belgium, and Portugal. Article I provides that in pursuance of the Treaty of Versailles the sums received from Germany for reparations shall be divided in the following proportions:

France	52 per cent.
British Empire	22 " "
Italy	10 " "
Belgium	8 " "
Japan and Portugal	¾ of 1% each

The remaining 6½ per cent. is reserved for the Serbo-Croat-Slovene states and for Greece, Rumania, and other Powers not signatories of the Agreement."

The United States, however, was excluded from the distribution and hence rejected all participation in the clauses of the Treaty dealing with reparations, including those sections upon which the Government seems to rely. Under the Dawes Plan and the Paris Agreement, the United States is to receive a small annual payment to cover Rhine Army Costs and American pecuniary claims.

The Government appears to rely primarily on paragraphs (d), (h) 2, and (i) of article 297 and paragraph 2 of the Annex to article 297 to defeat the present claims.

Apart from what has just been said with respect to the inapplicability, by reason of American non-acceptance, of article 297 to the United States, it can be shown that these specific clauses have been either expressly or by necessary implication rejected by the United States.

Paragraph (d) of article 297 provides:

> "As between the Allied and Associated Powers or their nationals on the one hand and Germany or her nationals on the other hand, all the exceptional war measures, or measures of transfer, or acts done or to be done in execution of such measures as defined in paragraphs 1 and 3 of the Annex hereto shall be considered as final and binding upon all persons except as regards the reservations laid down in the present Treaty."

This can have no relevancy to the present claims, even if the whole subject had not been definitely dealt with independently by Congress, by reason of the fact that the validity and binding character of the Joint Resolution of May 12, 1917, is not disputed. It is merely contended that certain legal results flow therefrom, namely, a claim to compensation.

Paragraph (h) 2 is one of three paragraphs dealing with the method which the Allied and Associated Pow-

ers may adopt in disposing of *'the net proceeds of sales of enemy (German) property''* in their possession.

In the first place, it may be said that the ships here in question or the values for which claim is now brought, are not "the net proceeds of sales of enemy property." Art. 297 (h) has, therefore, not the remotest application to these claims.

But even if the claim were to be regarded as instituted for the proceeds of liquidated property or cash assets seized by an Allied or Associated Power, it would still follow that the United States had excluded itself from Art. 297 (h) 2. The proceeds of liquidated property, under Article 297 of the Treaty of Versailles, are to be dealt with in one of three ways, according to the class into which a particular Allied State falls. The three classes of states are:

1. States which adopt the Clearing House provisions, for mutual discharge and set-off of private debts, from which provisions the United States has excluded itself;

2. New states and states "not entitled to share in the reparation payments," which are obliged to return private property directly to its owners; and

3. States which are entitled to share in reparations, which may use the proceeds of liquidated property to satisfy claims against Germany arising out of exceptional war measures, paying the balance either directly to the owners or to the Reparation Commission as provided in article 243.

Whether the United States is a country "not entitled to share in the reparation payments," which, by its own voluntary renunciation, seems to be the case, or whether it is a country "entitled to share in reparation payments," it appears to have adopted none of the methods provided for in Article 297 (h). It has neither

paid the proceeds of liquidated property to its owners under (2) above, nor has it used the proceeds in accordance with (3) above, to discharge claims of American citizens arising out of exceptional war measures of Germany, paying the balance to the Reparation Commission or to the owner. Instead, the United States has adopted a third course, not provided for in the Treaty of Versailles, of returning to its owners a considerable part of the sequestered or liquidated property—which can refer only to land property in the United States—but has retained the balance for the present, paying interest thereon to its owners (Act of March 4, 1923 42 Stat. 1511), until Germany makes suitable provision for the satisfaction of American claims. This complete departure from the provisions of Article 297 (h) of the Treaty of Versailles is sufficient to show that the United States has rejected that Article.

So far as concerns paragraph (i) of Article 297 by which

> "Germany undertakes to compensate her nationals in respect of the sale or retention of their property, rights, or interests in Allied or Associated States,"

it may be said that this section refers to the liquidated property under (h), from which, as already observed, the United States has excluded itself. In addition, it may be said that the owners of German property in the United States have no power to invoke Article 297 (i), for the United States is not deemed to have confiscated or retained any German private property, so as to give them a claim against Germany under the Treaty of Versailles. In fact, Article 297 (i) has no reference whatever to ships.

So far as concerns paragraph (2) of the Annex to Article 297, reading:

> "No claim or action shall be made against any Allied or Associated Power or against any

person acting on behalf of or under the direction of any legal authority or Department of the Government of such a Power by Germany or by any German national wherever resident in respect of any act or omission with regard to his property, rights, or interests during the war or in preparation for the war. Similarly no claim or action shall be made or brought against any person in respect of any act or omission under or in accordance with the exceptional war measures, laws, or regulations of any Allied or Associated Power,"

it may be said that this has, of necessity, reference only to the provisions of article 297, just mentioned. That article, in dealing with German property, has no reference to the United States, as already observed. But such application as it has to the citizens of Allied Powers is confined to those provisions of Article 297, which relate to the liquidation of German property, special damage to which is barred from becoming the subject of a claim, (contrary to the status of Allied private property liquidated by Germany) by virtue of Annex 2 to Article 297. The Annex can only be read in connection with the Articles to which it is appended, and not independently of its context, to cover claims not touched by or having any relation to it. That the Annex is confined to claims for special damage to liquidated property (over and above its intrinsic value, of which the private owner is assured by the Treaty) is evident from the decision of the French-German Arbitral Tribunal in the case of *Societé Vinicole de Champagne versus Consorts Mumm* of October 24, 1921 (Recueil des Decisions, v. 1, p. 694). The claim of this concern alleging the invalidity of a French war measure and for damage resulting therefrom was rejected under Annex (2) to Article 297, whereas their claim for the intrinsic value of the proceeds of the liquidation of their business in France was recognized, to the full amount of 85 million francs.

It will thus be apparent that the Government in support of its demurrer in the Court of Claims invoked clauses of the Treaty of Versailles which have no application to the United States. It could be shown by further analysis, for example, by the fact that the German owner is given a claim before a Mixed Arbitral Tribunal under Article 304, if his property has been undervalued or liquidated at inadequate prices, that the United States has completely rejected all these provisions of the Treaty of Versailles relating to the disposition of German private property or claims arising therefrom.

It is, of course, a historical fact that the United States refused to place the requisitioned German and Austrian merchant ships in an Allied pool to be distributed by the Reparation Commission according to losses. The United States declined to enter into this arrangement, not only because it abstained from any relation to the Treaty of Versailles and the Reparation Commission, but because the United States had already taken complete "possession and title" to the German and Austrian vessels and they were no longer German and Austrian but American vessels. (Senate Document 231, 66th Cong. 2nd sess.) The Allied Powers gave Germany credit in reparation account for all German tonnage seized and appropriated by them, though in no case was tonnage in port at the outbreak of war generally confiscated. See *The Blonde* and Other Ships, (P. C.) (1922) 1 A. C. 313. The owners of such surrendered vessels were compensated, at least in trifling part, under the Treaty of Versailles, by the German treasury. The United States has not only not given Germany any credit in reparation account for the vessels seized in American ports on the outbreak of war, but it purported not to have any reparation account. Nor have the owners been given any compensation for the vessels of which they were deprived,

either by Germany, from which it is not due, or from the United States, from which it is due.

The Government in the Court of Claims (Brief, p. 22) appears to have relied in part upon section 5 of the Knox-Porter Resolution as a ground for denying the jurisdiction of this Court. That section provides that

> "all property of the Imperial German Government, or its successor or successors, and of all German nationals, which was, on April 6, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States * * * shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as the Imperial German Government * * * or their successor or successors shall have * * * made suitable provision for the satisfaction of all claims against said Government * * * of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered * * * loss, damage," etc.,

through acts of the German Government or its agents.

It can, it is believed, be demonstrated that this section was designed solely to enable the United States to retain temporarily, as a pledge for the satisfaction of American claims, the property in the hands of the Alien Property Custodian. This is proved not only by the debates in Congress, and the declarations of Senator Knox, the author of the section, and Representative Porter, the co-author of the Peace Resolution of July 2, 1921, in which the section is found, but by the surrounding circumstances and subsequent history.

Section 5 was inserted in the Joint Resolution at practically the last moment before passage, June 28, 1921. In the course of the debate in the Senate, June 30, 1921, Senator Knox, the author, explained the pur-

pose of the section as follows (*Congressional Record*, 67th Cong., June 30, 1921, v. 61 p. 3397, other edition page 3249).

MR. KNOX:

"The purpose of inserting that provision was this: We had a treaty with Prussia running away back, I think to 1799, and renewed in 1828—I may not be correct about the dates, but the Senator knows of what I am speaking—in which we made a specific agreement with Prussia that even in case of war the rights of private property should be sacred. The State Department under the last administration failed to indicate that that treaty was not in force, and under the general rules of international law it would, I think, be construed to be in force.

"Of course the alien enemy act was in direct violation of that treaty if that treaty was in force. Of course the Senator knows the general proposition that the coming on of a war between two countries *ipso facto* terminates the treaties between those countries; but we made a treaty with the fact in view that we might possibly at some time be at war, and we passed an act of Congress which, of course, violated the terms of that treaty. We did not propose to become complicated with Germany upon that proposition, and therefore this joint resolution suggested that all of the seizures and all of the fines and all of the penalties imposed by the United States upon Germany and German nationals during this war should be confirmed by the German Government, and all claims which, I might state and I think I am entitled to state, morally would have arisen against the United States for the violation of a treaty which she had agreed should subsist even during a war should be waived, not with the idea, however, that ultimately the United States would shrink from her moral obligations to German citizens or nationals whose property she had taken, but until a fair adjustment by treaty should be made

between the United States and Germany covering the claims of American citizens against Germany for seizures and fines and penalties that had been imposed upon them. * * *"

MR. KNOX:

"The language the Senator has in mind *only has reference to the thing that has already been done by the Alien Property Custodian.* The whole theory is this: Speaking for myself personally, *I hope the day is not far away when we shall come back to the traditions of the American people that the right upon land of private property belonging to an alien enemy is a sacred right;* that such property may be taken into custody only for the purpose of conservation; and that at the end of a war there shall be a strict accounting to the owners of that property by the Government of the United States, which may take it temporarily into its possession. That is one of the principles for which this country has contended for a hundred years. While, as Chief Justice Marshall said, the Congress may have the power to provide that the private property of alien enemies may be taken during a war, it can only do so by putting upon itself a moral turpitude of which we ought to be ashamed.

"The purpose of the joint resolution is simply to hold in status quo the things that have been done by the Alien Property Custodian. The joint resolution simply states that until a suitable adjustment has been made of the claims of American citizens against Germany *for the property that has been seized by Germany, the property in the hands of the Alien Property Custodian shall be held until Congress shall dispose of it."*

Nothing could make clearer than this language of the author that the purpose of section 5 was solely and alone to enable us to retain the private property in the hands of the Alien Property Custodian, as security for the payment of American claims. The ships to which

"possession and title" had been taken in 1917 were not thought of in this connection, for they were no longer German property in any sense.

Mr. Knox continued, in reply to a question from Senator Walsh:

> "I will go as far as any Senator in this Chamber in trying to deal with the German citizen whose property we have taken on a basis that conforms to the traditions of our country, but I want to avoid the complications that will arise out of claims presented diplomatically and otherwise. God knows that when we have the power to deal with foreign nations in respect to anything we do it with the utmost generosity, liberality, and altruism" (*ibid.*, p. 3398, other edition page 3250).

Representative Porter, Chairman of the House Committee on Foreign Affairs, explained in the House the meaning of section 5 of the Knox-Porter Resolution.

MR. PORTER:

> "Mr. Speaker, in view of the fact that the Senate accepted the House resolution, it is unnecessary to make other than a very brief statement:
>
> "The first added section makes more specific *the control of alien enemy property*. It is the opinion of your conferees that the rights of the United States and its nationals are fully protected by section 2 of the House resolution, which reserves all the rights, privileges, indemnities, reparations, or advantages under the treaty of Versailles, and the further reservation of all rights, privileges, indemnities, reparations, or advantages 'by virtue of any act or acts of Congress.' *Our possession of the alien property* is by virtue of acts of Congress and the reservations of the House resolution are sufficient. However, some concession has been made and it will do no harm to add the section" (*ibid.*, p. 3401, other edition page 3254).

Representative Burton, of Ohio, a member of the Committee on Foreign Affairs, in speaking on June 13th, 1921, of a proposal similar to that incorporated in section 5 of the Knox-Porter Resolution, said:

> "The total value of enemy property seized by us is estimated at $350,000,000. This may not be sufficient to meet just claims for reparation, but we could occupy no better situation in this regard if a technical state of war continues" (*ibid.*, p. 3059, other edition page 2515).

This statement clearly shows that only the property in the hands of the Alien Property Custodian was in contemplation as security for American claims, for its amount had repeatedly been stated as about $350,000,000. As a matter of fact, it appears that the American claims now being allowed by the Mixed Claims Commission will probably come to considerably less than the value of the property in the hands of the Alien Property Custodian. The present estimate for the claims of private citizens is about 160 million dollars. The ships having completely passed into American ownership, were no longer thought of as German property or associated in any way with the idea of retention as security for American claims.

So in reporting to the House the changes made by the Conference Committee on June 28, 1921, in the Peace Resolution, the Conference Report states:

> "Two sections have been added to the House Amendment. The first of the new sections—section 5—*makes more specific the treatment to be accorded to alien enemy property.* While in the opinion of your conferees the original House provisions furnish ample safeguards, there appears to be no valid objection to an additional provision of this character" (*ibid.*, p. 3320; other edition page 3254).

In the debate in the House on section 5, it is evident that only the property in the hands of the Alien Property Custodian was deemed to come within its provisions. A few extracts from that debate (*ibid.*, pp. 3403-3404; other edition pages 3256-3257), will amply demonstrate the correctness of this conclusion:

"MR. COOPER:

"Now, I want to ask the chairman whether that word 'seizures' relates only to seizures, or would it, or would any phraseology in this amendment, if enacted into law confirm the sales of the millions of dollars' worth of alien property sold by A. Mitchell Palmer, many of which sales were private?"

MR. PORTER:

"In the first place, the confirmation is limited to the United States. It does not extend to our nationals. There is quite a distinction between a seizure and a sale. We purposely omitted confirmation of sales for fear it might confirm sales that are alleged to have been fraudulent. A seizure of necessity is by the United States Government and we merely confirm that act. A seizure may be perfectly legal, as our seizures were, while a sale of the seized property might be illegal.

"All through the drafting of this legislation we kept that point to the front, and I feel certain that there is nothing in this resolution that will confirm either directly or indirectly any fraudulent sales, if there were any * * *."

MR. COOPER, of Wisconsin:

"Mr. Speaker, the gentleman from Pennsylvania, the chairman of the committee, says this point was kept to the front during the drafting of the resolution. Yes; and if I may say it without violating the rules of propriety, I desire to add that I helped to keep it to the front, and that I helped to keep it to the front, Mr. Speaker,

because of the work of A. Mitchell Palmer and of what I had learned of the attitude and purpose of his successor, the present Alien Property Custodian.

"And this reminds me that yesterday one of the papers published in this city contained the statement that the resolution as now presented to the House by the conferees had been drafted *in consultation with, and embodied the suggestions of, the present Alien Property Custodian.* Now, his desire and purpose are clearly shown in the brief which he submitted to the Committee on Foreign Affairs, and a copy of which I have in my hand. From it I now read."

MR. PORTER:

"It appears that while we are in possession of *a large amount of alien enemy property, we have made demands for other property and the demands have not been complied with.*"

MR. LUCE:

"The section under consideration, section 5, appears to reach, in the last line on the first page of the report, a declaration *that the future of this property* shall be provided for by law. Then the rest of the section appears to go on with a provision, as *to the disposition of the property,* but leaves it uncertain whether this provision is to be taken as a declaration of policy or as in itself a statute involving in certain contingencies the fate of the property. Will the gentleman tell me whether it was intended that the latter part of the section should be in the nature of a statute?"

MR. PORTER:

"The purpose of the section is to perfect all of the rights of the United States and its nationals. It is a reservation of the rights of this country. It is not a suggestion as to the terms of the treaty, our purpose being to preserve the status of the parties."

Mr. Luce:

"I quite understand that, and I approve and agree with it, but in the latter part of the section you proceed to declare *that this property shall be held until a certain event, namely, the performance of a condition imposed on certain foreign Governments.* This leads to serious complication * * *."

Mr. Towner:

"If I may make the suggestion, I will say to the gentleman from Massachusetts that that is law, that every word of section 5 is law. It is properly what might be called *ad interim* law. It is made with the expectation that thereafter this Government will take further action about it, either by more law or by a treaty which will have the force and effect of law. It occurs to me that there can be no complication in regard to the matter because *in effect all of this is to hold the property in status quo.* * * *"

Mr. Cockran:

"There is not one of these alleged conditions that can have any actual result whatever.

"Let us assume that they were all stricken out. We would have still remaining all that a resolution of this character can possibly effect. You can add nothing to it as a declaration of peace by declarations of what you intend to do with certain property seized in the course of the war.

"*That property is in our possession—ours to do with as we please.* Whether we declare our purpose in respect to it now or at some other time is of no consequence whatever."

In this connection, certain other significant facts besides the debates warrant consideration. Section 5 speaks only of property which has "come into the possession or under the control of, or has been the subject

of a demand by the United States." It is significant that no mention is made of property of which *title* had already been taken by the United States. This would seem to show that Congress realized that only German property then in the hands of the Alien Property Custodian was to be held in pledge for American claims. The ships had long passed out of German ownership, and their fate was to be settled independently. Not a shred of evidence has been found to warrant the belief that the ships or their value are regarded as a pledge for the American claims or were in any way included or referred to in section 5 of the Knox-Porter Resolution. In fact, all the evidence shows that the ships from the very beginning were dealt with by Congress independently of the land property seized by the Alien Property Custodian.

In the case of the land property, ultimate disposition was left to Congress; in the case of the ships complete "possession and title" had been taken as far back as 1917, and there was nothing further for Congress to do. The law would take its course, as several members of the House debating the Joint Resolution of May 12, 1917, correctly declared. That law the claimants are now before this Court to vindicate.

It may also be observed that when the Winslow Act was passed, March 4, 1923, returning $10,000 to every owner of property held by the United States under section 5 of the Knox-Porter Resolution, an effort was made to include the ship-owners in the benefits of the Act. The effort was unsuccessful, because it was deemed that the ship-owners were in a class by themselves, whose property was not being held as security for American claims.

It is believed, therefore, to have been demonstrated that the seized ships do not fall in any way within the property retained as a pledge for American claims, under section 5 of the Knox-Porter Resolution, and

that they are, therefore, not in any sense, included in the Treaty of Berlin. They are quite outside the Treaty, and the present claims must be determined quite independently of any provision of the Knox-Porter Resolution, the Treaty of Versailles or the Treaty of Berlin.

IV.

The Court of Claims had Jurisdiction of These Claims.

The present claim is made not for specific ships or property held by the United States, but for the value of property of which the claimants were deprived by Act of Congress and the President, in 1917, by virtue of which their ships were appropriated and taken for the public use, as the Joint Resolution of May 12, 1917, authorized and provided.

It is believed that it has been demonstrated that the Joint Resolution of May 12, 1917, was not an act of confiscation, but, as it purported to be, an exercise of the power of eminent domain over private property within the jurisdiction of the United States. By the terms of the Resolution and the uniform practice of the United States, which cannot be lightly disregarded, the taking involved a promise to pay.

These operative facts have as their necessary consequence a legal claim within the jurisdiction of the Court of Claims. The claim is not a political one for Congress to settle. Congress has already fully acted in the premises by authorizing the President to take over to the United States the "possession and title" of privately-owned ships lying in American harbors, and intentionally left the legal consequences to be determined by the law of the land. In full contemplation of that law, they provided that the valuation of the ships thus

taken over was to be ascertained by a Government Board, and they made special provision that the findings of this Board should constitute "competent evidence in all proceedings on any claim for compensation." It seems sophistry to doubt what these words mean. Congress has laid the ground-work of fact on which the law must now take its course. It seems hardly possible to conceive a case more clearly within the jurisdiction of the Court of Claims than this one, and several members of the House in the debate of the Joint Resolution of May 12, 1917, expressed that opinion.

Finally, it may be proper again to advert to the fact that this Court is now asked to maintain the traditions of the United States. A denial of those traditions will signify that the declarations of American policy in the past have been merely opportunist expressions of pious wishes, not seriously intended to bind the nation. Such an inference, which the affirmance of the judgment of the Court of Claims would imply, would not only stultify our historical record, but would do the United States irreparable harm in the future, for a nation which, on momentary provocation of financial gain, casts aside its time-honored principles has, it is believed, a precarious future. Mr. Justice Field in his opinion in *Hartman* v. *Greenhow*, 102 U. S. 672 remarked:

> "There is no wealth or power equal to that which ultimately comes to a State when in all her engagements she keeps her faith unbroken."

An opportunity is now presented to affirm the national tradition or to deny it. The decision should not lightly be made.

We cannot better sum up our plea that the Court maintain the traditions of the nation and that sense of decency which heretofore has inspired its public conduct than by quoting the words of one of our fore-

most lawyers and statesmen, John Bassett Moore, who, as chairman of a recent international conference, declared that he refused to believe that the present generation would "consciously relinquish the conception that all human affairs in war and peace must be regulated by law and abandon itself to the desperate conclusion that the sense of self-restraint, which is the consummate product and essence of civilization, has finally succumbed to the passion for unregulated and indiscriminate violence."

Respectfully submitted,

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Of Counsel.

EXHIBIT A.

List of Vessels

Name of Owner	Names of Vessels	Fair and Reasonable Value at Time of Taking
Deutsche Dampfschifffahrts-Gesellschaft, *Hansa*,	*O. J. D. Ahlers*	3,300,000
	Ockenfels	2,000,000
	Adamsturn	1,500,000
	Liebenfels	1,200,000
	Elmshorn	1,420,000
	Bochum	1,672,000
	Esslingen	1,672,000
	Kiel	1,424,000
	Magdeburg	1,424,000
	Harburg	1,410,00
	Setos	1,672,000
	Serapis	1,672,000
Deutsch-Australische Dampfschiffs-Gesellschaft,	*Adelheid*	$840,000
	Ottawa	580,000
	Matador	360,000
	Dalbek	620,000
	Steinbek	540,000
	Indra	370,000
	Kurt	750,000
	Maia	817,600
Deutsche Dampfschifffahrts-Gesellschaft Kosmos,	*Frieda Leonhardt*	538,600
Flensburger Dampfercompagnie,	*Rudolph Blumberg*	538,600
Rhederei-Aktien-Gesellschaft von 1896,		
Carl Joh. Klingenberg & Co.,	*Portonia*	872,000
Knohr & Burchardt Nfg.,	*Hohenfelde*	934,600
	Camilla Rickmers	1,633,800
Wachsmuth & Krogmann,	*Arnoldus Vinnen*	420,000
G. J. H. Siemers & Co.,	*Clara Mennig*	502,600
Helm & Molzen,		
Adolph Leonhardt, owner of Steamship Line of Leonhardt & Blumberg,		
Dampfschiffs-Rederei *Horn* Aktien-Gesellschaft in Lubek,		
D. Fuhrmann Nissle Gunther Nfg.,		
Rickmers Rhederei Aktiengesellschaft,		
Bremer Stahlhof Aktiengesellschaft,		
Otto Zelk Dampfschiffs Rederei,		